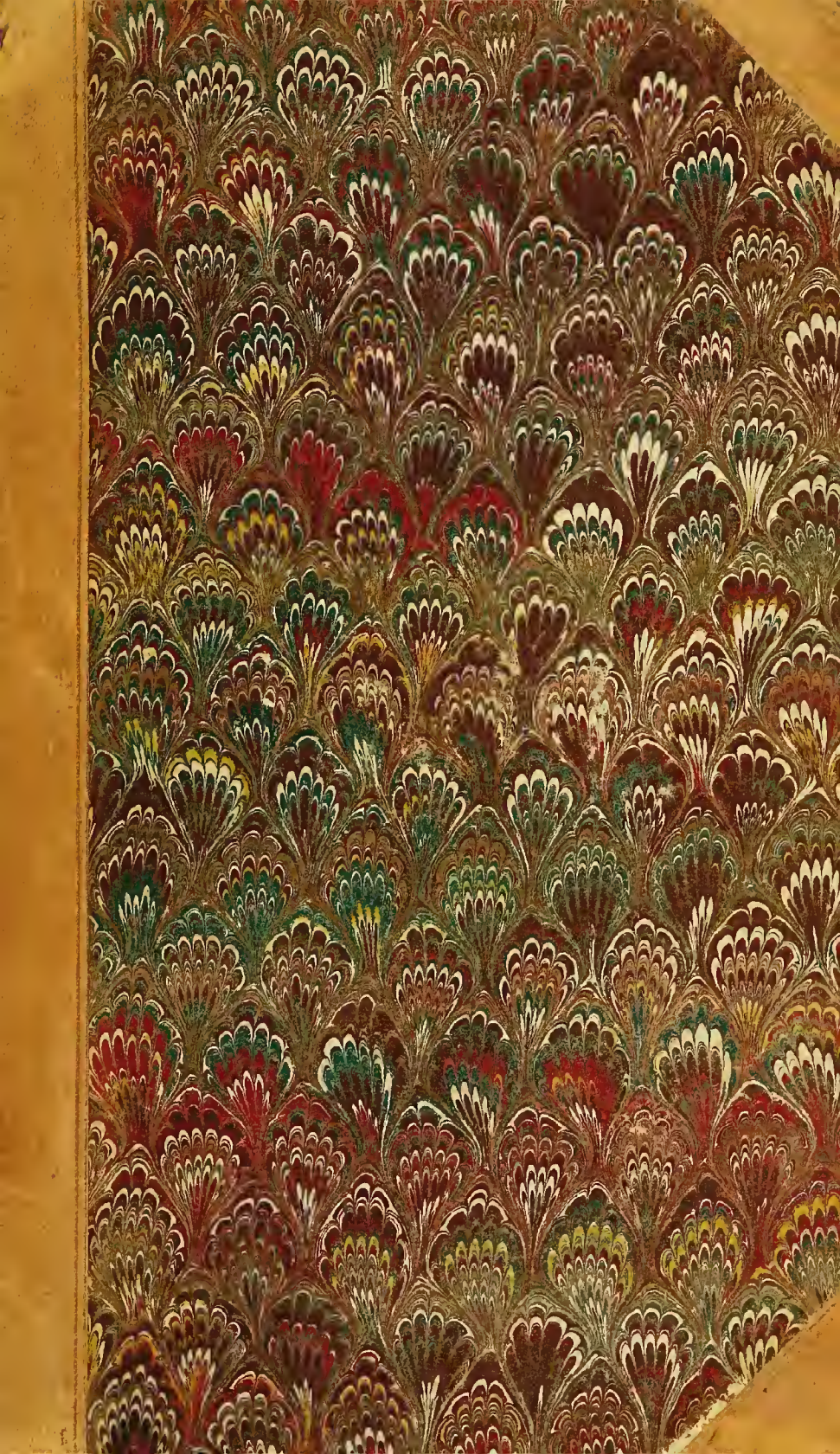

A SUPPLEMENT

TO THE TREATISE ON

INSOLVENT DEBTORS,

CONTAINING THE

STATUTES PASSED AND DECISIONS RENDERED SINCE THE PUBLICATION OF THE SECOND EDITION (NOVEMBER, 1884).

BY

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SUPPLEMENT.

PART I.

"THE TWO-THIRDS ACT."

§ 26. *How Order Published and Served.*—In *Billinge* v. *Pickert*, 46 Supm. Ct. (39 Hun), 504; s. c. 1 State R. 70, the order to show cause directed service, personally or by mail, to the creditor, "at his place of business," instead of "at his usual place of residence," and the record showed that service was made by mailing the order to the creditor at his place of business, it was held that the court did not acquire jurisdiction to grant a discharge. It was further held (although the decision on this point appears to be open to doubt) that upon a trial where the discharge was pleaded as a defense, it was not competent to sustain the discharge by proof that personal service of the order was in fact made. See § 43.

§ 52. *Debts Due Non-resident Creditors not Discharged.*—A creditor who is a non-resident, and in no way made a party to insolvency proceedings under a State law, is not affected thereby. *Satterthwaite* v. *Abercrombie*, 24 Fed. Rep. 543.

§ 62. *Impeaching the Discharge on Motion.*—In *Robens* v. *Sweet*, 28 Week. Dig. 417, the defendant sought to have an order for his examination in proceedings supplementary to execution set aside for the reason that he had obtained a discharge under the Act. In reply, plaintiff proposed to show by affidavits that the discharge had been fraudulently obtained. It was held that the validity of the discharge could not be tried collaterally on affidavits.

PART II.

"THE FOURTEEN DAYS' ACT."

§ 87. *Affidavit of Petitioner.*—It is held in *Schaeffer* v. *Riseley*, 6 State R. 417, that the affidavit must be made on the day of the presentation of the petition, and not previously, and it is intimated that no copy of affidavit need be served.

§ 92. *Proceedings when "Just and Fair."*—In the *Matter of Haight*, 11 Civ. Pro. R. 227, it was held that only existing creditors could object to a discharge on the ground of a fraudulent disposition of property. It was also held that where a debtor had received a sum of money which he had expended in paying expenses of travel and living, incurred in attempts to keep beyond the jurisdiction of the court, that was such a wrongful disposition of his property as would prevent a discharge.

In the *Matter of Lowell*, 8 Civ. Pro. R. 5; s. c. 3 Daly, 306, it was held that a judgment-debtor who had fraudulently obtained property, and used it in the support of himself and family, knowing that the creditor must be the loser, had disposed of the property with intent to delay and defraud that creditor, and must be refused a discharge. It was also held in that case, that when the debtor, after incurring the liability which was the ground of his assignment, had invested a large sum in real estate in his wife's name, claiming that the investment was made in satisfaction of a prior indebtedness to her, that such investment was made "for the future benefit of himself or family."

When the petitioner, just before executing a general assignment, withdrew a sum of money and applied it to his own use, with the design that it should not come to the

assignee under the assignment, it was held that his conduct was such as to show that his proceedings were not just and fair within the meaning of this Act. *In re Howes*, 9 Civ. Pro. R. 17.

In the *Matter of Donoghue*, 17 Abb. N. C. 277 (N. Y. Com. Pleas), it is said that the question how far a debtor on the limits, who earns a comfortable salary, is bound in justice and fairness to apply it to the payment of the execution debt on which he is imprisoned, depends upon the claims of his family upon him for support, and it seems that if he spends more than in the judgment of the court is proper for that purpose, that will be an unlawful disposition of his property which will defeat an application for discharge.

In the *Matter of Brown*, 46 Supm. Ct. (39 Hun), 27, it is said: "In order to prevent a discharge, it is necessary that the transaction alleged to be fraudulent should have injured or defrauded the creditor contesting the discharge (*Matter of Brady*, 69 N. Y. 215); but if that be the case, we conceive it is immaterial whether such transaction preceded or followed the recovery of judgment by such creditor, or even the cause of action on which such judgment was obtained.

In the *Matter of Caamano*, 8 Civ. Pro. R. 29; s. c. 2 How. Pr. N. S. 240, where the debtor converted to his own use a large sum of money which had been intrusted to him, and afterward, under a power of attorney, obtained other moneys of his creditor which he also converted, it was held that under the authority of *Suydam* v. *Belknap*, 27 Supm. Ct. (20 Hun), 87, the debtor was entitled to his discharge.

It seems that the burden of proof to show that the petitioner's proceedings have not been just and fair is on the objecting creditor. *Matter of Brown*, 46 Supm. Ct. (39 Hun), 27; *In re Caamano*, 8 Civ. Pro. R. 29; s. c. 2 How. Pr. N. S. 240.

§ 96. *Discharge.*—The sheriff is not liable, in an action for false imprisonment, for refusing to discharge from his

custody an imprisoned debtor upon an order for such discharge, which, upon its face, does not appear to be an order made by the court. *Hayes* v. *Bowe*, 12 Daly, 193.

As to liability of sheriff for an escape when the proceedings for discharge are irregular, see *Schaffer* v. *Riseley*, 6 State R. 417; *Goodwin* v. *Griffis*, 88 N. Y. 629.

PART III.

GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

CHAPTER VII.

DEFINED AND DISTINGUISHED: THE ASSIGNMENT LAWS.

§ 104. *Definition of General Assignment.*—In *Hine* v. *Bowe*, 53 Supm. Ct. (46 Hun), 196, debtors made an absolute bill of sale of their property to a creditor, and in return took back from him an agreement, that in consideration of the transfer he would discharge the indebtedness due to him, and would also pay certain specified debts of the debtor, and certain other claims which the debtors might direct him to pay, not exceeding a specified sum. It was held that this transaction did not constitute a general assignment for the benefit of creditors. There was no element of trust. The covenant to pay the specified claims was a part of the consideration for the *absolute* purchase of the property.

To come within the definition of a general assignment, the conveyance must be voluntary. Where a valuable consideration is shown for the transfer, the conveyance is not a general assignment. *Lewis* v. *Miller*, 23 Wkly. Dig. 495.

§ 105. *Distinguished from Mortgages.* — *McClellan* v. *Remsen*, 36 Barb. 622, affid. 5 Abb. N. S. 250, was followed in *Bier* v. *Kibbes*, 50 Supm. Ct. (43 Hun), 174, and the distinction between a conveyance in trust for the benefit of the grantor, and the mortgage reserving the equity to the mortgagor, is drawn.

The assignor has no reversionary interest in assigned

real estate upon which a judgment obtained after the assignment can attach as a lien. A judgment-creditor, whose judgment was obtained after the assignment, has no right to redeem land from a sale made under execution, on a judgment obtained before the assignment. *People ex rel. Short* v. *Bacon*, 99 N. Y. 275.

§ 106. *Assignments Directly to Creditors.*—In *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504, revg. 31 Hun, 274, where one of the assignors executed conveyances of two separate parcels of land without consideration, but upon the understanding that the grantee should apply the proceeds of the property to the payment of certain creditors of the firm of which the grantor was a member, and a few days after a general assignment was executed by the firm of their firm property, and afterwards the other partner executed a deed of certain of his individual property to the general assignee to be used for the purposes of the trust, and it appeared that each of these conveyances was free from fraud, it was held that the special conveyances were not within the provisions of the General Assignment Act, and not void for failure to comply with its provisions. The court said: "Considering the Act as a general act, enacted for the specific purpose named, we think it must be held to relate to a general assignment for the benefit of creditors, and not to a specific assignment for the benefit of one or a limited number of creditors. It does not relate to a specific conveyance of the character of the one here presented, which is not a general assignment, but a transfer of specific property in payment of certain creditors particularly named."

Royer Wheel Co. v. *Frost*, 13 Daly, 233, was brought to set aside as fraudulent a mortgage made before the assignment by one of the partners referred to in the case last cited. The mortgage was conditioned for the payment of certain debts due to other persons than the mortgagee. The mortgage was held valid as not being within the contemplation of the Assignment Act. The cases of *Knapp* v.

McGowan, 96 N. Y. 75, and *Tiemeyer* v. *Turnquist*, 85 N. Y. 516, are considered as establishing the rule that the Assignment Act does not apply to assignments of a portion of the debtor's property for the benefit of specified creditors. See *post*, § 141.

§ 106*a*. *Special Assignments and Transfers made in Contemplation of a Subsequent General Assignment.*—An interesting question has arisen in several of the States in which preferential assignments are prohibited or declared void as to the effect of mortgages, confessed judgments, and other means employed by debtors to secure or pay creditors, with the purpose of giving them a preference on the eve of the execution of a general assignment.

It was held in *Preston* v. *Spalding*, 120 Ill. 208, that "when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken; the law will regard all his acts, having for their object and effect the disposition of his estate, as parts of a single transaction, and on the execution of the formal assignment it will, under the statute, draw to it, and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and if any preferences are shown to have been made or given by the debtor to one creditor over another on such disposition of his estate, full effect will be given to the assignment, and such preferences will, in a Court of Equity, be declared void, and set aside as in fraud of the statute." See *Berry* v. *Cutts*, 42 Me. 445; *Holt* v. *Bancroft*, 30 Ala. 193; *Kellogy* v. *Root*, 23 Fed. R. 525; *Woonsocket Rub. Co.* v. *Falley*, 30 Fed. 808, and a collection of authorities at page 811.

In *Weil* v. *Pollack*, 30 Fed. R. 813, it was held in the United States Circuit Court that where an insolvent debtor confessed eight judgments at the same time, but made

no assignment, that such confessed judgments were not in violation of the assignment law of the State of Missouri which prohibits preferences. But where a confessed judgment was followed immediately by the execution of a general assignment, it was held that the confessed judgment and assignment were parts of one transaction, and the preference of the judgment under the statute must be disregarded. *Clapp* v. *Nordmeyer*, 25 Fed. R. 71. The following authorities bear upon this question: *Backhaus* v. *Steeper*, 66 Wis. 68; *Moore* v. *Clinch*, 70 Iowa, 208; *Van Patten* v. *Burr*, 52 *Id.* 518; *Martin* v. *Mausman*, 14 Fed. R. 160; *Freund* v. *Yaegerman*, 26 *Id.* 812; *Farwell* v. *Maxwell*, 34 *Id.* 727; and see *post*, § 160.

§ 110. *Amendments to Act of* 1877.—In 1885 (Laws of 1885, c. 464) the General Assignment Act was amended by modifying section twenty-three, so as to provide that the county judge might authorize the assignee to sell, as well as to compromise or compound claims or debts belonging to the estate.

In 1885 (Laws of 1885, c. 380) an act was passed to the effect that all powers, rights, and duties conferred upon county judges under the Assignment Act were also conferred upon and could be exercised by the Supreme Court, and the justices of the Supreme Court concurrently with the county courts and judges. See *post*, Chap. XVIII.

In 1886 (Laws of 1886, c. 283) the Act of 1884, referred to in the text (§ 110), was amended so that § 29 should provide that "in all distributions of assets under all assignments," &c., wages should be preferred, as in the previous enactments. See *post*, § 160.

In 1887 (Laws of 1887, c. 503), a section (§ 30) was added to the Act, the intention of which was to prevent preferences being made to the extent of more than one-third of the assigned estate. See *post*, Chap. XI.

In 1888 (Laws of 1888, c. 294), section two of the Act was amended by inserting a provision to the effect that the assignment must specifically state therein the residence and

the kind of business carried on by the assignor at the time of the assignment, and the place at which the business is conducted. See *post*, § 125.

CHAPTER VIII.

PARTIES TO ASSIGNMENTS.

§ 112. *Assignments—by Whom Made.*—On the question of the right of a non-resident to execute an assignment under our statute, Mr. Justice Van Brunt says, in *Grady* v. *Bowe*, 11 Daly, 259, 271: "The General Assignment Act of 1777 evidently contemplated the making of assignments by non-residents of the State of New York who are carrying on business within said State." After citing the language of the statute, he adds: "This language evidently contemplates those cases where the assignor lives out of the State, and is intended to apply to every transfer of property situated in the State of New York made for the benefit of creditors, when the assignor has carried on his business within this State."

§ 117. *Assignments by Partners of Partnership Property.*—See article in 22 Am. L. R. N. S. 37, on the rights of one partner to assign copartnership property. In *Hooper* v. *Beecher*, 4 State R. 473, where the complaint, in the nature of a creditor's bill to set aside an assignment, averred that the assignment was executed by the partners, and this allegation was admitted in the answer, it was held that the plaintiff could not be permitted on the trial to introduce proof tending to show that the assignment was invalid because it was not executed with the assent of all the partners.

The fact that one of two partners was *non compos mentis* does not of itself confer the power upon, and authorize the other member of the firm alone, to convey the partnership

property to a trustee under a general assignment. *Friedburger* v. *Jaberg*, 11 State R. 718.

In *Rockafellow* v. *Miller*, 107 N. Y. 507, the doctrine of *Adee* v. *Cornell*, cited in the text, and affirmed in 93 N. Y. 572, to the effect that only one who is a partner by contractual relation need join in the assignment, is confirmed. See *Osborne* v. *Barge*, 29 Fed. R. 725.

§ 120. *Surviving Partners.*—It seems now to be settled by the weight of authority that a surviving partner, at least with the consent of the personal representatives of the deceased partner, can execute a general assignment containing preferences. *Haynes* v. *Brook*, 49 Supm. Ct. (42 Hun), 528; *Williams* v. *Wheadon*, 46 Supm. Ct. (39 Hun), 98; *Beste* v. *Burger*, 17 Abb. N. C. 162; *Emerson* v. *Seuter*, 118 U. S. 3; and see note in Abb. Dig. 1886, Tit. Assignments. In *Nelson* v. *Tenney*, 43 Supm. Ct. (36 Hun), 327, as between the surviving partner and the representatives of the deceased, the survivor occupies a relation of trust, and as to them, an assignment made by the survivor with preferences, and without the consent of the representatives, is an abandonment of the trust, and equity will step in to prevent the consummation of the attempt, and take the firm property into its custody and administer it through a receiver. *Nelson* v. *Tenney*, 43 Supm. Ct. (36 Hun), 327.

§ 120*a*. *Power of Surviving Partner to Assign Partnership Real Estate.*—Where real estate is conveyed to a firm, or to copartners in their individual names for the use and benefit of the firm, or in the payment of debts due the firm in the absence of any agreement or understanding to the contrary, the grantees become at law tenants in common of the land, and upon the death of either the legal title to his individual share descends to his heirs at law. *Buchan* v. *Sumner*, 2 Barb. Ch. 165; *Coles* v. *Coles*, 15 John. 159; Lindley on Partnership, starpaging 664, note.

The heir at law holds in common with the surviving partner in trust for the purposes of the partnership: first,

for the creditors; second, for the members of the firm and their representatives. Lindley on Partnership, *supra*; *Brown* v. *Brown*, 3 M. Y. L. & Keen, 443; *Howard* v. *Priest*, 5 Metc. 582; *Buchan* v. *Sumner*, *supra*.

It follows that the surviving partner cannot sell the real estate without the concurrence of the heir at law. *Foster's Appeal*, 44 Pa. State, 397; Parsons on Partnership, starpaging 367.

The surviving partner, therefore, cannot by assignment in trust for the creditors convey the legal title to partnership real estate. But since the heir at law has the legal title in common with the surviving partner only in trust for the purposes to which it should be devoted, it has been held that a Court of Equity will compel the heir at law to join with the assignee of the surviving partner, or with the surviving partner himself, in making an effectual title to the real estate upon a sale in order to liquidate the partnership affairs. Thus, in *Delmonico* v. *Guillaume*, 2 Sand. Ch. 366, in an action for a specific performance, to which the heir at law was made a party, where the surviving partner of an insolvent firm had contracted to sell real estate belonging to the firm, it was held that the legal title to the extent of an undivided half was in the heir at law, but that he might be compelled to join with the surviving partner in executing a conveyance.

And in *Shanks* v. *Klein*, 104 U. S. 18, where a surviving partner had made a general assignment for the benefit of creditors of the firm, and the assignee had conveyed to purchasers real estate owned by the firm which he had sold as such assignee, it was held that the executor of the deceased partner would be restrained in equity from instituting proceedings at law to eject the purchasers from the assignee, and that he would be compelled, furthermore, to execute conveyances to the purchasers in support of the assignee's title. The English and American cases are to some extent considered in the opinion.

In harmony with this case are *Andrews* v. *Brown*, 21 Ala. 437; *Murphy* v. *Abrams*, 50 *Id.* 293; *Dupuy* v. *Leaven-*

worth, 17 Cal. 263. There are cases that hold that one partner, with the mere verbal consent of his copartner, can make an assignment of the copartnership real estate in the firm name. *Rumsey* v. *McCulloch*, 54 Wis. 565; *Sullivan* v. *Smith*, 15 Neb. 476.

§ 121. *Limited Partnership.*—An assignment for the benefit of creditors made by a limited partnership, containing preferences, is, under the statute (3 R. S. 7th ed. 2238, §§ 20, 21), void. It is not merely voidable, but is so inoperative that no title passes, and hence a subsequent assignment made by the assignees without preference will be valid. *Schwartz* v. *Soutter*, 5 Cen. R. 620.

§ 122. *To Whom the Assignment may be Made.*—The fact that the assignee does not reside in the State does not of itself furnish proof of fraudulent intent in making the assignment. *Blackington* v. *Goldsmith*, 3 How. Pr. N. S. 77. That fact, however, was considered, with other suspicious circumstances, as an element in a conclusion of fraud in making an assignment. *Nat. Park Bank* v. *Whitmore*, 104 N. Y. 297, 305; revg. 40 Hun, 499.

CHAPTER IX.

MAKING, ACKNOWLEDGING AND RECORDING THE ASSIGNMENT.

§ 125. *The Statute.*—The second section of the act as amended in 1888 (Laws of 1888, ch. 294), reads as follows: "Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and the kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in the city, the street and number thereof, and if in a village or town such apt desig-

nation as shall reasonably identify such debtor. Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged."

§ 126. *Form of the assignment.*—When the assignment contains a mere clerical error but the true meaning and intent cannot be doubted, the court must give effect to the instrument according to its true intent. In such a case it is not necessary that there should be a reformation of the instrument decreed. *Smith* v. *Bellows*, 3 State R. 305.

§ 127. *Contents of the assignment.*—In the case of *Flagler* v. *Schaeffer*, 47 Supm. Ct. (40 Hun), 178, it was contended that an assignment drawn to the assignee, "his heirs, executors, administrators and assigns," was improper in form, but the court held that there was nothing in the contention, the purpose being clearly to vest an estate in the assignee as trustee for creditors.

And in *Hess* v. *Blakeslee*, 2 State R. 309, it was held that when the assignment was drawn to the assignee, "his successors and assigns," these words were not open to criticism. Under the Revised Statutes (2 R. S. 748, § 1, 7th ed., vol. 3, p. 2205), words of inheritance are not necessary to convey an estate in fee simple, but such words may be need-

ful to convey real estate situated in States where the common law still prevails. See *Van Winkle* v. *Armstrong*, 4 Cent. R. 53.

§ 131. *Schedules, when to be annexed.*—Where the assignment was of all the property contained in Schedule B, and was made to pay all debts mentioned in Schedule A, referred to these schedules as annexed, but they were not annexed or recorded with the assignment, it was held that the schedules were not a necessary part of the assignment, since the assignment conveyed all the debtor's property in trust to pay all his debts. *Burghard* v. *Sondheim*, 50 Supr. Ct. (18 J. & S.) 116. In the case of *Franey* v. *Smith*, 54 Supm. Ct. (47 Hun), 119, it appeared that the schedule of preferred creditors referred to in the assignment was not annexed to the instrument, nor was it executed, acknowledged, or recorded. The assignment was decreed fraudulent and void.

§ 136. *Acceptance by assignee.*—When the assignment was by deed of indenture assigned, executed and acknowledged by both parties, but it did not contain any express words of acceptance on the part of the assignee, it was held that on such form of conveyance an assent of the assignee was not only implied but was the very essence of the contract itself, and therefore this was a sufficient compliance with the provision of the statute which requires that the assent of the assignee subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of or endorsed upon the assignment before the same is recorded, and if separate from the assignment shall be duly acknowledged. *Scott* v. *Mills*, 18 Abb. N. C. 330.

§ 137. *Acknowledgment.*—*Smith* v. *Boyd*, referred to in the text, is reported in 67 How. Pr. 351; s. c., 10 Daly, 140, and *Smith* v. *Tim*, in 14 Abb. N. C. 447. The first case was reversed in the Court of Appeals, 101 N. Y. 472, where it was held that the certificate showed a due acknowledg-

ment of the instrument. A similar conclusion was reached in the General Term of the Supreme Court where the same assignment was brought in controversy. *Claflin* v. *Smith*, 13 Abb. N. C. 203.

Although the notary's certificate may be defective, if the assignment was in fact properly acknowledged, a new certificate may be made by the notary, and in such event the assignment is undoubtedly valid, unless it be as against rights which have intervened. *Camp* v. *Buxton*, 41 Supm. Ct. (34 Hun), 511.

Where the pleadings admit the making of the assignment it is not competent to show on the trial that a partnership assignment executed by one partner in the firm name was unauthorized. *Hooper* v. *Beecher*, 4 State R. 473.

The fact that the notary who took the acknowledgment was a preferred creditor in the assignment, does not disqualify him from acting. *Wendell* v. *Reeves*, 26 Weekly Dig. 239; 6 State R. 863.

In *Jones* v. *Howard Ins. Co.* 10 State R. 120, in an action brought by an assignee upon a cause of action coming to him under the assignment, it was held that defendant could not question the validity of the assignment on the ground that it was not properly acknowledged. This decision may be questioned. An unacknowledged assignment is void, not voidable, and there is no provision of the assignment act or rule of law which makes it void as to creditors merely, and valid as to the assignee's debtors. See *McMahon* v. *Sherman*, 14 State R. 637.

When one partner who is authorized to make an assignment, executes it in the firm name and acknowledges it, the assignment is properly executed. *Klump* v. *Gardner*, 15 State R. 100; see *Osborne* v. *Barge*, 29 Fed. R. 725.

§ 138. *Recording the assignment.*—The general assignment takes effect from its delivery; all requirements of the statute subsequent to the delivery are directory merely, and an omission to obey any of them does not invalidate the assignment. *Warner* v. *Jaffray*, 96 N. Y. 248; *Ryan* v.

Webb, 46 Supm. Ct. (39 Hun), 435; *Pancoast* v. *Spowers*, 52 Supr. Ct. 523; affirmed as *Nichol* v. *Spowers*, 105 N. Y. 1.

In *McBlain* v. *Spellman*, 42 Supm. Ct. (35 Hun), 263, the assignment was executed, acknowledged and delivered to the assignee, but before it was recorded an attachment was levied, by the assignor on the assigned goods, it was held that the title to the goods passed under the assignment to the assignee, notwithstanding the fact that the assignment had not been recorded.

In *Warner* v. *Hodge*, 41 Supm. Ct. (34 Hun), 524, it was held that an unrecorded assignment of real estate was not effectual as against a purchaser in good faith, and without notice. An assignment of real property must be recorded as a conveyance of real property. Approving *Simon* v. *Kaliski*, 37 How. 249.

§ 139. *When the assignment takes effect.*—Where an assignment was executed by a debtor who was about to visit Europe, and was left with his actuary under instructions to keep it until further instructed, or until he thought it necessary for the best interest of all the creditors to file it; in an action to set aside the assignment which had been subsequently delivered, recorded by the attorney, it was held that the assignment was invalid because there was a reserved power to revoke the assignment. *Reichenbach* v. *Winkhaus*, 12 Daly, 525.

This decision may be questioned. The assignment was not to take effect until delivery; it appears there was no reserved power to alter or vary its provisions after it became effective as a conveyance.

A general assignment was signed and sealed by the assignors in Virginia, and was then sent to the assignee who received and accepted it in this State. It was held that the assignment became operative as a contract in this State, and its validity was to be determined by the laws of this State. *Grady* v. *Bowe*, 11 Daly, 259.

CHAPTER X.

THE ASSIGNED PROPERTY.

§ 141. *Assignment of part of a debtor's property.*—The case of *Knapp* v. *McGowen*, 19 Weekly Dig. 182, referred to in the text, has been affirmed, 96 N. Y. 75. See *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504, where it was said that the assignment act was not intended to apply to special assignments of part of a debtor's property. *Royer Wheel Co.* v. *Frost*, 13 Daly, 233; see *ante*, § 106.

§ 142. *Assignment for the benefit of part of the creditors.*—An assignment of all a debtor's property to a trustee for the payment of certain debts, with a direction that the surplus shall be returned to the assignor, is fraudulent and void. *Sutherland* v. *Bradner*, 46 Supm. Ct. (39 Hun), 134; see *Hine* v. *Bowe*, 53 Supm. Ct. (46 Hun), 196.

§ 144. *Property fraudulently conveyed by the assignor.*—The assignee acquires the right to recover property which has been fraudulently conveyed by the assignor, and may maintain an action to recover it although not a judgment-creditor. The cases will be found collected under § 294.

§ 145. *Trust funds and consigned goods.*—Where the assignors had received a quantity of goods on consignment, which they sold and retained the proceeds, mingling them with their own funds, it was held that the assets received by the assignee were charged with a lien in favor of the consignors to the amount of such proceeds. *Standard Wagon Co.* v. *Nichols*, 48 Supm. Ct. (41 Hun), 261.

So where a stock broker having securities of his customers in his possession pledged them to secure his own debt, and the securities were sold by the pledgee, thus diminishing his claim upon other securities, the proceeds of which came to the assignee, it was held that the fund so received by the assignee was impressed with an equity in

favor of the owner of the securities wrongfully pledged. *Matter of Smyth*, 2 How. Pr. N. S. 431; affi'd at Gen. Term. 24 Weekly Dig. 217; Ct. of App. 105 N. Y. 619.

It is a rule of equitable cognizance that funds and property impressed with a trust may be pursued until they reach a holder in good faith. *Denton* v. *Merrill*, 5 State R. 387. Thus where one of the members of a firm who was county treasurer, deposited the moneys which he received in that capacity to the credit of the firm, and the firm used the money, it was held that there was a presumption that the firm was liable to the county for the money. *Ibid.*

So where an administrator deposited certain securities with both sureties on his administration bond for their protection, which they afterward sold and appropriated the proceeds to their own use, and then made a general assignment, it was held that the assets in the hands of the assignee being increased to the amount of the funds so appropriated, was properly chargeable therewith in favor of the representatives of the estate. *Matter of Mumford*, 5 State R. 305. See *The People* v. *The City Bank of Rochester*, 96 N. Y. 32; *Rabel* v. *Griffin*, 12 Daly, 241; *Hooley* v. *Gieve*, 9 Daly, 104; affi'd, 82 N. Y. 625; and see note to this case, 9 Abb. N. C. 41.

In *Matter of Cavin* v. *Gleason*, 105 N. Y. 256, where certain securities were left with the assignor, a broker, to sell and invest in a certain mortgage, and the assignor realized on the securities $3,000, and disposed of the entire sum with the exception of $30, and then made a general assignment, it was held that the creditors had no prior right of payment out of the general assets of the assignor, and that a direction to the assignee to pay over to the creditor any large sum, than the $30 which he had received from the specific property was improper. This case is said to have overruled *People* v. *City Bank of Rochester*, 96 N. Y. 32; see *National B. & D. Bank* v. *Wilkinson*, 10 State R. 290.

§ 147. *Rights subsequently accruing.*—In the case of *Taft* v. *Marsily*, 54 Supm. Ct. (47 Hun), 175, it was held that

a claim for enhanced premiums of insurance payable under the act of Congress for the distribution of the "Geneva Award," was not assignable and did not pass to an assignee in bankruptcy. The rule is different with regard to losses paid for damages for unjust capture. See *Bachman* v. *Lawson*, 109 U. S. 659; *Leonard* v. *Nye*, 125 Mass. 455.

§ 149. *Property in transit.*—See note on stoppage in transit, *post*, § 276 *a*.

§ 155. A wife takes dower in the surplus of real estate fraudulently assigned by husband after foreclosure and sale. *N. Y. Life Ins. Co.* v. *Mayer*, 19 Abb. N. C. 92.

CHAPTER XII.

APPROPRIATION OF PROPERTY IN ASSIGNMENTS BY FIRMS AND THEIR MEMBERS.

§ 166. *When firm and individual property included.*—In *Becker* v. *Leonard*, 49 Supm. Ct. (42 Hun), 221; 3 State R. 765, where the assignment recited that it was made by copartners, and conveyed all the property of the parties of the first part, with directions for the payment of individual debts, it was held that the title to the individual property of the assignors passed under the assignment. Citing *Eastwood* v. *Ward*, 35 Law Times, N. S. 502; *Williams* v. *Hadley*, 21 Kan. 350; 30 Am. R. 430; *Judd* v. *Gibbs*, 3 Gray, 539.

But in the *Matter of Davis*, 1 How. Pr. N. S. 79, where the assignment was also made by copartners, but contained no specific reference to individual property or debts, it was held that it should not be construed as intending to provide for individual creditors or to convey the individual assets.

Although the Assignment Act of 1877 relates to general assignments only, by which is understood a conveyance of

the whole body of a debtor's property, yet an assignment by the members of a firm of the firm property is within the Act, although the individual property of the partners is not included in the conveyance. *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504; revg. 38 Supm. Ct. (31 Hun), 274; 2 Cent. R. 512.

§ 167. *Assignments of firm property providing for payment of individual debts.*—In *Peckham* v. *Mattison*, 15 Abb. N. C. 367, n., it was held that when an insolvent firm is indebted to a firm, some of the members of which are also members of the insolvent firm, a general assignment made by the insolvent firm, and giving a preference to such creditor firm, will not be rendered invalid by reason of such preference.

If the preference had been of an individual debt due to a member of the assigning firm, the assignment would have been invalid as to firm creditors. See *Matter of Rieser*, 26 Supm. Ct. (19 Hun), 202; affid. 81 N. Y. 629; *Hayes* v. *Bement*, 3 Sandf. 394; *Hayes* v. *Heyer*, 35 N. Y. 326, 328.

The appropriation of firm property to pay an individual debt of a partner is such a fraudulent disposition of the firm assets as will avoid the assignment. *Fourth Nat. Bank* v. *Burger*, 15 State R. 101.

The appropriation by an insolvent partnership of its assets under a general assignment for the payment of the individual debts of one of the partners, invalidates the conveyances when assailed by a creditor of the partnership. *Windmuller* v. *Dodge*, 67 How. Pr. 253; *Friend* v. *Michaelis*, 15 Abb. N. C. 354.

In *Crook* v. *Rindskoff*, 41 Supm. Ct. (34 Hun), 457, revd. 105 N. Y. 476, the assignment, after providing for the payment of firm debts, proceeded: "That with the remainder and residue of said net proceeds and avails, if any there shall be, the party of the second part shall pay and discharge all individual and private debts of the parties of the first part, or either of them, whether due or to become due, provided such remainder shall be sufficient for that

purpose; and if insufficient, then the same shall be applied *pro rata*, share and share alike, to the payment of said debts and according to their respective amounts."

It was held that this language did not require the application of one partner's property to the payment of the debt of another, and that it was competent to show by parol what the debts of the respective partners were and what their individual assets were, and that when it appeared that any misapplication of the property of one partner, if such misapplication should result from this direction, was trifling, that no fraudulent intent could be inferred. It was also held that none but partnership creditors could complain. See *Friend* v. *Michaelis*, 15 Abb. N. C. 354.

In *Denton* v. *Merrill*, 5 State R. 387, it is intimate that a preference given out of partnership assets of a debt, for which the firm might not be liable in an action at law, might not render the assignment fraudulent if the claim was found in just equitable considerations, as where trust funds had been used by one partner in the partnership business, and had gone to swell the assets of an insolvent firm. Barker, J., says: "When a member of a firm borrows money and uses it in the business of the partnership, or when he appropriates the money of another for that purpose, the presumption goes in behalf of the lendee or owner of the fund so used of liability of the firm to him." Citing *Estate of Davis*, 5 Wharton, 530; 34 Am. Dec. 574; *Brown* v. *Higginbotham*, 5 Leigh, 583; 27 Am. Dec. 618; *Jacques* v. *Marquand*, 6 Cow. 497; *Hutchinson* v. *Smith*, 7 Paige, 26–33; *Ontario Bk.* v. *Hennessy*, 48 N. Y. 545.

A partnership debt, though evidenced by the individual note of a member of the firm, is equitably payable out of the partnership property, and may be preferred in payment out of partnership assets. *McCarthy* v. *Fitts*, 20 Wkly. Dig. 225.

Only a firm creditor can complain of the appropriation of firm assets to the payment of the individual debts of the assignor. *Haynes* v. *Brooks*, 17 Abb. N. C. 152.

§ 168. *Assignment of individual property providing for payment of firm debts.*—The appropriation of individual property to the payment of firm debts, to the exclusion of individual creditors, is not a fraud on individual creditors. *Haynes* v. *Brooks*, 17 Abb. N. C. 152, 160.

Where members of a firm made a general assignment of firm property providing for payment of firm debts, and one of the firm afterwards made a separate assignment of his individual estate, in which he provided for the payment of all debts for which he was individually liable, which would in terms include the firm debts, it was held that this was not intended as a direction for the double payment of the debts. *Smith* v. *Perine*, 17 State R. 226.

§ 170. *Provision for payment of debts due a partner.*—Where one of two copartners makes a general assignment of his own and the firm's property, and prefers his partner as a creditor, such preference is fraudulent and renders the assignment void. *Whitney* v. *Hirsch*, 9 Civ. Pro. R. 249.

§ 171. *Assignment by partners after dissolution.*—In *Crane* v. *Roosa*, 47 Supm. Ct. (40 Hun), 455, where it appeared that when the firm was insolvent one of the partners bought out the other, paying him a sum of money and assuming the firm debts, of which he paid a part, and then made an assignment in which he preferred his individual creditors, it was left the jury to determine whether it was the intention of the purchasing partner to obtain the firm property so that he might prefer his individual creditors out of the proceeds, with the instruction that if such was the intent the assignment was fraudulent as to the firm creditors. Landon, J., dissenting, was of opinion that the assignment was absolutely fraudulent by reason of the existing insolvency at the time of the purchase and of the assignment.

In *Stanton* v. *Westover*, 101 N. Y. 265, the doctrine of *Dimond* v. *Hazard* is reaffirmed, and *Menagh* v. *Whitwell*, 52 N. Y. 146, is distinguished. The *bona fides* of the purchase

of the firm assets is the controlling factor. As to this Finch, J., says, in *Stanton* v. *Westover*, *supra:* "The insolvency of the purchasing partner, if known to him and to the seller, might very well be strong evidence of an intent to defraud the partnership creditors, and become conclusive upon that question if there were no explanation."

Bates v. *McNulty*, 4 State R. 646, is in accord with the prevailing opinion in *Crane* v. *Roosa*, *supra.*

Where one partner made payment to an individual creditor by a transfer of firm property three days before the assignment was made, and when he knew of the insolvency of the firm, and the assignment was made to the same person to whom the property was transferred, it was held that this constituted evidence of an intent to hinder, delay, and defraud creditors. *Friedburger* v. *Jaburg*, 11 State R. 718.

CHAPTER XI.

PREFERENCES.

§ 160. *Preferences in general assignments.*—In *Nat. Park Bank* v. *Whitmore*, 47 Supm. Ct. (40 Hun), 499, the General Term of the first department decided that an agreement made by a debtor at the time of contracting a debt, that in the event of his subsequently executing an assignment the indebtedness should be preferred, rendered invalid an assignment afterward made in harmony with such agreement. This view, however, was not sustained by the Court of Appeals. 6 Cent. R. 361. Earl, J., writing the opinion, remarked, "A failing debtor may make an assignment preferring one or more creditors because he is under a legal equitable or moral obligation to do so, or he may do it from mere caprice or fancy, and the law will uphold such assignment honestly made. If he may make such an assignment without any antecedent promise, why may he not make it after and in pursuance of such a promise? How can an act otherwise legal be invalidated because made in pursuance

of a valid or invalid agreement honestly made?" See *Smith* v. *Craft*, 11 Biss. 340; 17 Fed. R. 705.

§ 160*a*. *Preferences by Statute wages.*—The Act of 1884, chapter 328, providing for preference of wages debts, was amended by Laws of 1886, chapter 283, so that the first paragraph of section 29 of the Assignment Act now reads as follows: "In all distributions of assets under all assignments made in pursuance of this act, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment, shall be preferred before any other debts, &c."

The question has been presented in several cases as to whether a failure to comply with the provisions of the Act of 1884, renders the assignment invalid.

The case of *Richardson* v. *Thurber*, 104 N. Y. 606, arose on demurrer to a complaint which alleged that the assignors were indebted at the time of the making of the assignment for wages; that they did not prefer such wages debts, but directed that the assigned property should be applied to the payment of other debts in priority to such wages debts. It was held that this assignment, made after the passage of the Act of 1884, was not invalid by reason of the failure of the assignors to comply with that statute. The court was of opinion that the legislature intended in the event of the making of a general assignment to create a preference in the distribution of the assigned estate in favor of wages creditors, and it was also held that such a construction of the act would not render it unconstitutional, for the reason that since the legislature has power to regulate the mode of making general assignments, and to permit them to be made only on express conditions, that therefore "he who avails himself of the permission cannot be supposed also to repudiate its terms." This opinion is open to the criticism that in the case before the court there was no room for presumption as to what the assignor intended by his assignment. It was conceded by the demurrer that his intention was contrary to the requirement of the statute. That being

the case, if a general assignment is still a voluntary conveyance by contract, it is difficult to see how the legislature can constitutionally give it an effect different from its conceded meaning. Such power of remaking private contracts is not believed to exist in the legislature under our constitutional limitations.

A conclusion similar to that in *Richardson* v. *Thurber*, was reached in General Term, fifth department, in *Burley* v. *Hartson*, 47 Supm. Ct. (40 Hun), 121, the opinion being placed on somewhat different grounds; and to the same effect are *Roberts* v. *Tobias*, 9 State R. 59; *Johnson* v. *Kelly*, 6 State R. 388.

But in *Smith* v. *Hartwell*, 14 State R. 754, since the decision of *Richardson* v. *Thurber*, the General Term of the Superior Court of New York have held, Sedgwick, C. J., writing the opinion, that an assignment which does not comply with the statute is void. In that case it appears (see opinion of Ingraham, J., 14 State R. 754, *note*) that the plaintiff was an unpreferred wages creditor, and that some of the wages creditors had been preferred by the assignment, but not all. The decision of the Court of Appeals, in *Richardson* v. *Thurber*, was not alluded to.

§ 160*b*. *Preferences limited to one third the assets.*—By Laws of 1887, chapter 503, it was provided as follows: "Section 1. Chapter four hundred and sixty-six of the Laws of eighteen hundred and seventy-seven, entitled, "An act in relation to assignments of the estate of debtors for the benefit of creditors, as amended by chapter three hundred and twenty-eight of the Laws of eighteen hundred and eighty-four, and by chapter two hundred and eighty-three of the Laws of eighteen hundred and eighty-six, is hereby amended by adding thereto the following section: § 30. In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein [other than for the wages or salaries of employees under chapter three hundred and twenty-eight of the laws of eighteen hundred and eighty-four, and chapter two hundred

and eighty-three of the laws of eighteen hundred and eighty-six] shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, the said assets shall be applied to the payment of the same *pro rata*, to the amount of each said preferred claims."

Where it appeared that, in contemplation of making an assignment, the assignors confessed judgment to an amount exceeding one-third of their assets, and then made an assignment with preferences, and a creditor at large called upon the assignee to bring suit to restrain the payment over of proceeds arising on the sale of the assignors' property under execution on the confessed judgment, claiming that the judgments were confessed as part of the act of assignment, and to evade the statute, and the assignee declined to bring such suit, it was held at Chambers, by Mr. Justice Lawrence, that an injunction restraining the sheriff from paying over the money arising on such execution sale would be granted in a suit brought by a creditor at large to enforce the trust of the assignment. *Reissner* v. *Cohn*, Daily Reg. May 31, 1888. In *Third Nat. Bank* v. *Clark* (*Ibid.*), on substantially the same facts being made to appear, except that the assignee had not refused to bring suit, but alleged that he had so done, the injunction for that cause was dissolved.

These actions proceed upon the theory that a voluntary conveyance by a debtor to his creditor made contemporaneously with the making of an assignment, and for the purpose of giving preferences to such creditors, are to be regarded as part of the act of assignment, and if the preferences only are avoided by statute, in whole or in part, and the assignment itself is not rendered invalid by the giving of the forbidden preference, then the duty of the assignee is to distribute under the provisions of the statute, and he

ought to restrain creditors from enforcing liens on the assigned property to secure unlawful preferences. If the assignee declines to do his duty in this regard after demand by a creditor, then such creditor, as *cestui que trust* under the assignment, may bring the action to sustain and preserve the trust.

The case of *Thurber* v. *Richardson*, 104 N. Y. 606, went to the extent of holding that the legislature might lawfully direct as to the mode of distribution under an assignment, and that the courts would enforce the mandate of the legislature, whatever the expressed intent of the assignor. It would seem to follow that the application of a similar ruling to assignments made since the Act of 1886, would require the courts to distribute the assigned estate so that only one-third should come to the preferred creditors, whatever the direction of the assignment in that respect might be. If that be so then the question presented is whether assignors in contemplation of making an assignment may defeat the operation of the statute by confessing judgments and making voluntary special assignments to favored creditors.

Very able courts have taken opposing sides on this question, and the debate remains as yet open. In this State the question has been presented only at Special Term in the cases above cited, and in others which have followed the rule laid down by Judge Lawrence. See *Spellman* v. *Soussman*, Andrews, J., Oct. Special Term, 1888. But in other States under statutes either prohibiting preferential assignments or avoiding preferences contained in them, the legal principle at issue has been presented and passed upon. See *ante*, § 106.

§ 162. ***What debts may be preferred.***—As to the nature of the obligation between husband and wife, which will support a preference to the wife, the court after reviewing the authorities in *Lyon* v. *Zimmer*, 30 Fed. R. 401, says: "If a husband not acting in a fiduciary character as to his wife's income of which she personally has entire control,

collects such income habitually, with her consent and acquiescence, and mixes those collections with his own moneys, and does not at or before the time of collecting them give proof by his own declarations or acts that he receives them as hers for her separate use, and holds them as a debt due from himself to her, and she permits this appropriation of income to go on for a protracted period, then, and in such a condition of affairs, she cannot afterwards, on the occurrence of a family quarrel, of insolvency, or other event, recall a permission so long indulged, and require him or his assignees to make her a creditor of her husband for the amounts so collected." See *Syracuse Chilled Plow Co.* v. *Wing*, 85 N. Y. 421; affd. 20 Hun, 206; and see cases collected in note to *Lyon* v. *Zimmer*, *supra*, p. 411.

CHAPTER XIII.

FRAUD ON THE FACE OF THE ASSIGNMENT.

§ 173. *Assignments — how construed.*— Any particular provision in an assignment should be construed in the light of the whole context, and in view of the general rule that a construction will be preferred which will uphold rather than one which will destroy an instrument. *Bagly* v. *Bowe*, 105 N. Y. 171, 177; and *Crook* v. *Rindskopf*, 105 N. Y. 476, 485.

Whether a presumption of fraud arising from a provision contained in the assignment can be rebutted by parol evidence tending to show that under the circumstances of the particular case the provision would not, in fact, work an injury to creditors, is a question not entirely free from doubt. See *Crook* v. *Rindskopf*, 105 N. Y, 476, 482.

§ 178. *Assignments exacting releases.*—In *Chadwick* v. *Burrows*, 49 Supm. Ct. (42 Hun), 39, a firm of two mem-

bers having become insolvent, one of them absconded, the other, after calling a meeting of his creditors, with the approval of all but one of them, conveyed all the firm property to an assignee, who covenanted to pay each creditor fifty cents on the dollar of his claim. In an action brought by the creditor, who did not assent, to set aside the conveyance, it was held that it was not fraudulent, no release having been exacted, and it was also held that the creditor was entitled to recover from the assignee fifty per cent. of his claim.

§ 186. *Provisions for continuing the assignor's business.* —In *Robbins* v. *Butcher*, 104 N. Y. 575, the assignment contained a provision to the effect that should it be necessary and to the better performance of the trust, the assignee should have authority to finish unfinished work, and complete buildings. The court held that this clause gave the assignee no independent discretion to continue the business of the assignor, but that he was subject to the control and supervision of the courts, which was not superseded or destroyed by the provision of the assignment.

§ 191. *Authority to sell on credit.*—In *Bagly* v. *Bowe*, 6 State R. 842, it appeared that after the declarations of trusts the assignment contained a clause empowering the assignee to execute and acknowledge—for such consideration, in money *or other thing*, as he may deem sufficient—all such deeds, &c., as in his discretion may, from time to time, be necessary to carry into effect the intent and purpose of this instrument, it was held that this clause, taken in connection with the other provisions of the assignment, did not confer on the assignee the power to sell the assigned property on credit. This construction was sustained by the Court of Appeals (*Bagly* v. *Bowe*, 105 N. Y. 171), although the judgment was reversed on another ground.

The assignment conveyed all the debtor's property, but made no provision for the sale of the personal property, and directed the return of surplus to debtors after the

payment of certain preferred debts, held that the assignment was invalid as to unpreferred creditors. *Sutherland* v. *Bradner*, 23 Weekly Dig. 124.

§ 194. *Power to compound debts due the assignor.*—A provision in a general assignment authorizing the assignee to compound or compromise debts owing to the assignor, does not invalidate the assignment. *Bagly* v. *Bowe*, 6 State R. 842; 105 N. Y. 171.

CHAPTER XIV.

FRAUD FROM EXTRINSIC CIRCUMSTANCES.

§ 203. *Intent to defeat execution.*—In *Clark* v. *Taylor*, 44 Supm. Ct. (37 Hun), 312, a debtor against whom a judgment was about to be entered, agreed with the creditor that if judgment was delayed he would pay the debt in installment, and also "that if he was pressed in any way, or if he was threatened, he would at once notify the plaintiff's attorney, so that he might enter the judgment and issue an execution thereon ahead of any assignment or other creditor," at the same time making a false statement as to his financial standing. On the trial it appeared that an assignment had already been drafted which, however, was not used. After making some payments on account, the debtor executed a general assignment without notice to the creditor of his intention to do so. On this state of fact the majority of the court were of opinion that the evidence sustained the finding of a fraudulent intent in making the assignment. Hardin, P. J., being of opinion that the agreement conferred a trust upon the assets in the hands of the consignee, which the court would enforce.

In *Hess* v. *Blakeslee*, 2 State R. 309, when the debtor made certain statements to induce the creditor to abstain from issuing execution, and then executed an assignment

with the intent to defeat the priority of an execution, the General Term sustained a finding upholding the assignment. See *Reichenbach* v. *Winkhaus*, 67 How. Pr. 512; *Ross* v. *Wigg*, 41 Supm. Ct. (34 Hun), 192.

§ 207. *Contemporaneous acts.*—The withdrawal, secretion, or disposition of assets for the future benefit of the assignor, in contemplation of the making of an assignment, when connected with the assignment as part of one scheme, may furnish evidence of an intent to defraud in making the assignment.

Thus, where it appeared that the assignors, on the day they made the assignment, gave away and disposed of a quantity of goods to their friends, and for their own benefit and accommodation, that the money that was on hand was taken by one of them after the assignment had been made, and that certain notes that were preferred were not made and delivered at the time they purported to be, it was held that the plaintiff had made out a case to set aside the assignment, and that the complaint should not have been dismissed. *Crouse* v. *Hessler*, 17 Wkly. Dig. 519.

Again, where it appeared that the assignors intentionally withheld a considerable portion of their estate from the operation of the assignment, and appropriated it to their own use in contemplation of and as part of the plan of the assignment, it was held that this fraud was inseparable from the assignment itself, and rendered it fraudulent as to creditors. *Iselin* v. *Henlein*, 2 How. Pr. N. S. 211. The same question was presented, and the same principle applied in the case of an attachment issued on the ground of the fraudulent disposition of property under this same assignment. *Victor* v. *Henlein*, 41 Supm. Ct. (34 Hun), 562.

Where it was made to appear that the debtors who composed a firm had, in contemplation of the assignment, drawn from the firm assets large amounts, which in part they applied to the payment of individual debts, and in part intended to appropriate to the support of themselves

and their families, it was held that this was to be regarded as contemporaneous with and as a part of the assignment, and as such was indicative of a fraudulent intent in applying firm property to the payment of individual debts, and as being a reservation for the benefit of the assignors. *Victor* v. *Henlein*, 34 Hun, 562; see *Vial* v. *Mathewson*, 34 Hun, 70.

Where the assignors resided in New Jersey, and there had personal property which they individually owned, and this property was not included in the schedule made after the making of a preferential assignment in New York, the court was of the opinion that if the property had been in New York its omission from the schedule would have been indicative of a fraudulent purpose in the assignment; but inasmuch as under the New Jersey statute a transfer to an assignee under a preferential assignment was absolutely void, so that the assignee could take no title, the property situated in New Jersey was not included in the assignment, and its omission from the schedule was not, therefore, a subject of criticism. *Eastern Nat. Bk.* v. *Hulshizer*, 2 State R. 93.

The case of *Brown* v. *Halsted*, 17 Abb. N. C. 197, has been reversed by General Term, but the opinion has not yet been reported.

But notwithstanding these cases, it is still true that where an assignment is legally and honestly made, it cannot be set aside because the assignors had previously disposed of property to defraud creditors. *Victor* v. *Nichols*, 13 State R. 461.

And where, before making the assignment, the partners drew small sums for the purpose of paying private debts and to support their families, held that such withdrawals did not necessarily prove that the assignment afterward made was fraudulent. *Victor* v. *Nichols*, *supra*.

A sudden and unexplained disappearance of assets, as evidenced by the difference between statements made by the debtors and their condition as shown by the schedule, furnishes evidence of fraudulent intent in making a general assignment. *Buhl* v. *Ball*, 48 Supm. Ct. (41 Hun), 61; see

Globe Woolen Co. v. *Carhart*, 67 How. Pr. 403; *Victor* v. *Henlein*, 41 Supm. Ct. (34 Hun), 562; *Skinner* v. *Oettinger*, 14 Abb. 109; *Claflin* v. *Hirsch*, 19 Wkly. Dig. 248.

But evidence which merely goes to establish that the debtors made misrepresentations as to their financial condition, is not proof that an assignment afterward executed is fraudulent. *Kreef* v. *Sickle*, 15 State R. 248; *Fleitman* v. *Sickle*, 13 *Ib.* 399.

The Court of Appeals held, in *Nat. Park Bank* v. *Whitmore*, 104 N. Y. 297, that where a few days before the assignment was made the defendants reported they were entirely solvent and could pay all their debts in full, and made a statement of their affairs showing a large surplus of assets over liabilities; and soon after these representations claimed that they could not pay their debts in full, and that they were insolvent, and proposed to their creditors a compromise of fifty cents on the dollar, payable in nine, twelve, and fifteen months without security, and the evidence tended to show that they had been engaged in a prosperous business yielding them large profits, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency, but threatened that unless their offer of compromise was accepted they would make an assignment preferring one creditor, and that then the rest of their creditors would get little or nothing; these facts, taken in connection with the efforts of the defendants with the co-operation of their assignee after the assignment, apparently to coerce a compromise at twenty-five cents on the dollar, their offer "to fix it up" with a creditor afterward if he would assent to the compromise, their selection of a foreign assignee, the relations between him and them, and the secret promise of a future preference, justified the Supreme Court in refusing to vacate an attachment obtained upon the ground that the assignment was made with the intent to hinder, delay, and defraud creditors.

In *Meyers* v. *Marx*, Special Term Supm. Ct. Daily Reg., it was held by Van Brunt, J., that where assignors when

insolvent, with the purpose of transferring their indebtedness to foreign creditors, purchased largely abroad on credit, and with the proceeds of the goods so bought discharged obligations to their domestic creditors, relatives, and friends, and then executed a general assignment with preferences, the whole being a scheme to transfer their indebtedness at home to their creditors abroad, the assignment so executed as a part of such scheme was fraudulent and void. And see *Brackett* v. *Griswold*, 14 State R. 449.

The case of *Talcott* v. *Hess*, 31 Hun, 282, referred to in the text, was again before the court, and the second appeal is reported in 4 State R. 62, where the evidence is reviewed and the conclusion is reached that the debtor intended to subject the assigned property to incumbrances which were fictitious, so as to induce unpreferred creditors to believe that there was nothing for them, thereby be induced to compromise their cause, and that for that reason the assignment was invalid.

§ 208. *Subsequent acts of the assignor.*—When the schedules are subsequently made by the assignors they may be used as evidence of intent in making the assignment. *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; *Phillips* v. *Hecker*, 14 State R. 120. But schedules prepared and filed by the assignee are not in themselves evidence of the assignor's intent. *Denton* v. *Merrill*, 5 State R. 387; and see *post*, § 257.

When the assignment was made to a clerk of the assignors, who sold a portion of the property and disposed of the remainder to the mother of one of the assignors, who was a preferred creditor, and she afterwards carried on the business under her son's name, adding the word "agent," it was held that though these facts were suspicious they were not such as would justify the General Term in reversidg a finding in favor of the assignment in the court below. *Eastern Nat. Bk.* v. *Hulshizer*, 2 State R. 93.

§ 210. *Evidence of intent.*—If the assignment is executed by one of the partners with a fraudulent intent, it is

absolutely void whether such intent is participated in by his copartners or not. *Fourth Nat. Bk.* v. *Burger*, 15 State R. 101.

In *Flagler* v. *Schoeffel*, 47 Supm. Ct. (40 Hun), 178, an action by an assignee for conversion, defendant, for the purpose of proving that the assignment under which plaintiff claimed was fraudulent, offered to prove declarations of the assignor made both before and after the assignment, it was held that the evidence was properly excluded. As to the declarations made before the assignment, it was said that not having been made at or about the time of the assignment they were not part of the *res gestæ*, and that there being no proof of conspiracy, they were not admissible as declarations of a co-conspirator. The declarations subsequent to the assignment were not shown to have been made while the assignor was in possession of the assigned property.

In *Jellinck* v. *May*, 48 Supm. Ct. (41 Hun), 386, there being evidence that the assignor continued in possession of the assigned property, it was held that his declarations after the assignment were competent, as well as his declaration forming part of the *res gestæ*.

In *Hess* v. *Blakeslee*, 2 State R. 309, where the assignment was attacked on the ground of inducement and representations made by the debtor to prevent creditors from pursuing their remedies, it was held that it was not competent to ask the plaintiff whether it was upon certain representations made by the assignor that he delayed proceedings, since the question to be determined was what the intent of the assignor in making the assignment was, and the creditors' motive or mental operations could not tend to establish the assignor's intent.

In *Vidvard* v. *Powers*, 41 Supm. Ct. (34 Hun), 221, an action of replevin by a vendor to recover from a general assignee goods fraudulently obtained by the assignor, it was held that the declarations of the assignor before the assignment were not competent. Citing *Bullis* v. *Montgomery*, 50

N. Y. 352; *Truax* v. *Slater*, 86 *Id.* 630; and *Von Sachs* v. *Kretz*, 72 N. Y. 548.

For the purpose of showing fraudulent intent, it is competent to prove that the assignors omitted property from their schedule. *Loos* v. *Wilkinson*, 10 State R. 297.

Entries in the books of the assignors, made in the course of business prior to the assignment, are admissible to show the indebtedness of the assignors. *Ib.*

In *Becker* v. *Koch*, 6 Cent. R. 509, where the plaintiff called the assignor as a witness, who upon his direct examination made statements which would show that certain of the preferred and other debts provided for by the assignment were fictitious, but upon his cross-examination gave explanations which, if believed, would relieve the transactions of their fictitious character, it was held error to direct a verdict for the plaintiff on the theory that the explanations being uncontradicted, were conclusive on the plaintiff for the reason that they could not impeach their own witness. The court held that in such a case the jury might believe such parts of the witness's evidence as seemed to them credible, and disbelieve other parts which seemed to them inconsistent or untruthful.

§ 212. *Fictitious and fraudulent debts.*—In *Freedman* v. *Boerman*, 6 State R. 402, the wife of the assignor was preferred upon an alleged indebtedness, which arose as follows: the wife having brought an action for divorce, the husband paid her the sum of $3,000 upon her discontinuing the action and agreeing to live apart from him; afterward she returned to live with him and returned him the $3,000 for which he gave his note which constituted the preferred indebtedness, it was held that the note was without consideration, and the assignment fraudulent.

As to whether a preference of a debt not in existence or for an excessive amount given under a mistaken belief that the debt, as stated, was an actual indebtedness, will vitiate the assignment, see *Freedman* v. *Boerman*, 6 State R. 402;

Brown v. *Halstead*, 17 Abb. N. C., 197, reversed on appeal; *First National Bank of Westport* v. *Raymond*, 14 State R. 868.

The fact that the defendant included in his schedule of liabilities more debts than he disclosed to the plaintiff just before the assignment, is, of itself, no evidence of fraud, unless it appears that the debts mentioned in his schedules, or a portion of them, were fraudulent. *Freeman* v. *Campbell*, 1 State R. 728.

Where it appeared that the assignors, shortly before making the assignment, stated that they owed no private debts, but the assignment contained preferences to their relatives for sums which were not entered in their books, this evidence cast upon the assignee the burden of proving that the preferences were *bona fide*. *Beatty* v. *Soman*, 6 State R. 669.

Where the assignor made and filed the inventory and schedules and inserted therein a specific sum as due to a preferred creditor and afterwards the preferred creditor presented a claim for a large amount and the debtor testified to the correctness of this later claim, it was held that the inventory and schedule being truthful that even if the parties fraudulently conspired to attempt to procure the allowance by the assignee of a fictitious sum, that could not be evidence of a fraudulent intent on the making of the assignment. *Phillips* v. *Tucker*, 14 State R. 120.

To defeat the assignment it must appear that fraudulent intent of the assignor existed at the time of its execution, and it cannot be effected by subsequent illegal conduct or acts on his part. *Phillips* v. *Tucker*, 14 State R. 120; *Schultz* v. *Hoagland*, 85 N. Y. 464.

Where all the debts were contracted in the name of a firm but were really the individual debts of the assignor by whom all the assigned property was owned, the assignment was held not to be fraudulent merely because it described some of the debts as firm debts, and of others as individual debts. There is no fraud in preferring a claim which is in reality upon the same footing as all the other debts, mere-

ly because it appears to be of a different character. *Gorham* v. *Innes*, 10 State R. 867.

And where the assignors assigned certain claims to a creditor to reimburse him for money loaned, and afterward made a general assignment and preferred this creditor, it was held that this did not invalidate the assignment, inasmuch as the creditor was entitled to be paid only once, either out of the assigned claims or by the preference. *Blain* v. *Pool*, 13 State R. 571.

A firm, being indebted its members for certain sums of money, at the request of these members made their notes for the respective amounts to relatives of the partners, and afterwards made a general assignment in which they preferred these notes, held that the preferences were illegal and the assignment fraudulent. *First National Bank of Champlain* v. *Wood*, 10 State R. 87.

Where a merchant commences business on borrowed capital, putting in no capital of his own, and allows statements to be made through the mercantile agencies as though the capital so invested were his own, and thus obtains goods on credit, which he sells and applies the proceeds to the support of himself and family, and finally makes an assignment preferring the money so borrowed as capital, the assignment is fraudulent. *Webb* v. *Armistead*, 26 Fed. R. 70.

CHAPTER XV.

PROCEEDINGS OF CREDITORS TO AVOID THE ASSIGNMENT.

§ 218. *Creditors who assent.*—The case of *Cavanagh v. Morrow*, referred to in the text, is reported in 67 How. Pr. 241.

The mere fact that a creditor has presented a proof of his indebtedness under the assignment, when he has taken no actual benefit under the assignment, does not preclude

him from afterward attacking the assignment. *Talcott* v. *Hees*, 4 State R. 62.

A creditor who participates in proceedings in equity for the distribution of property sold under a deed of trust, so far makes himself a party to the deed as to waive his right to deny its validity and must be deemed to have elected to surrender any lien he may have had upon the property and to look to the proceeds of sale instead. *Horsey* v. *Chew*, 3 Cent. R. 879; see *Matter of Davis*, 1 How. Pr. N. S. 79.

In *Iselin* v. *Henlein*, 2 How. Pr. N. S. 211, 218, it appeared that after the creditors had obtained an attachment against the assigned property they presented a proof of their debt to the assignee and annexed thereto a statement that they did not intend thereby to waive any right they had acquired under the attachment nor to recognize in any manner the assignment unless it was held to be binding and valid against them; afterwards they applied for the removal of the assignee under the Assignment Act, it was held that the creditors had not by these proceedings waived their right to attack the assignment for fraud.

Where a creditor obtained an attachment under which he attempted to levy on the assigned property but took nothing, it was held that this was not such an election as precluded him from afterward maintaining an action to compel an accounting under the assignment. *Sternfeld* v. *Simonson*, 51 Supm. Ct. (44 Hun), 429.

Under the New Jersey statute which bars the creditor who proves his debt under an assignment from having afterward any action or suit at law or equity against the assignor or his representatives, where a firm makes an assignment of firm property merely, a firm creditor who proves his debt under such assignment, is not precluded from afterward suing the individual members of the firm. *Huggard* v. *Lehman*, 43 Supm. Ct. (36 Hun), 307; see note Am. L. Reg. N. S. 403, 411.

§ 219. *Creditors who are not injured.*—The cases cited in the last paragraph of the section are criticised in *Crook* v. *Rindskopf*, 41 Supm. Ct. (34 Hun), 457, where it was held that a provision in an assignment which in effect permitted the appropriation of one partner's property to the payment of another partner's debt rendered the assignment invalid at the suit of a firm creditor. See this case reversed, 105 N. Y. 476, and see *Haynes* v. *Brooks*, 17 Abb. N. C. 152, 158.

A distinction is to be observed between void and voidable assignments. Assignments which never become operative because not legally executed, or which are declared void by statute, as for instance assignments with preferences made by limited partnerships, may be adjudged void at the suit of any judgment-creditor. Such assignments stand in the way of the enforcement by any creditor of his claim against his debtor. But where the assignment is good between the parties, and the creditor seeks to set it aside because made with a fraudulent intent, then the rule applies that he cannot be heard to complain of that as a fraud upon him which is in no respect injurious to him. This distinction has not always been observed as in *Richardson* v. *Herron*, 46 Supm. Ct. (39 Hun), 537, 540, where the text was cited as applying to a case where an action was brought to set aside any assignment as absolutely void because of its failure to comply with statutory requirements.

§ 219*a*. *Fraudulent assignment as ground for arrest in civil action.*—The fact that one member of a firm with knowledge of its insolvency has paid certain of his individual debts out of the firm's property is not such evidence of an intent to defraud creditors as will justify the issuing of a warrant of arrest under the provisions of the Code (*Sherrill Roper Air Eng. Co.* v. *Harwood*, 37 Supm Ct. [30 Hun], 9), but where it appeared in addition to such payments from firm property, that there were other suspicious circumstances, such as a statement showing a large surplus of assets made to a commercial agency shortly before the failure, to induce credit, unusually large sales of merchan-

dise at auction and confessions of judgments for large amounts, these circumstances were held to be such as to justify a finding of a fraudulent intent in making the assignment which would support an order of arrest. *Hinck* v. *Dessar*, 24 Week. Dig. 500.

In *Unteremeyer* v. *Hutter*, 33 Supm. Ct. (26 Hun), 147, where it appeared that the debtor having made a general assignment, concealed and withheld part of the assets from the assignee, and upon this ground an order of arrest was obtained by a creditor, it was held that the fact that the assignee had a cause of action to recover the concealed assets furnished no reason why the order of arrest should be vacated. See *McButt* v. *Hirsch*, 4 Abb. Pr. 441.

§ 220. *Proceedings by attachment—fraudulent intent of the debtor.*—The doctrine of *Milliken* v. *Dart*, cited in the text, to the effect that a constructive fraud, not involving a fraudulent motive, will not sustain an attachment, is sustained in *Blackington* v. *Goldsmith*, 3 How. Pr. N. S. 77. See *Friend* v. *Michaelis*, 15 Abb. N. C. 354. See *Schwartz* v. *Stiller*, Lawrence, J., Daily Reg. January 2, 1885.

When the defendants a few days before the assignment represented themselves as solvent and made a statement showing a large surplus, and afterwards claimed that they were insolvent and proposed a compromise with their creditors, and the evidence tended to show that they were engaged in a prosperous business and did not furnish any explanation of the sudden alleged insolvency, it was held that these facts, together with efforts at compromise and the selection of a foreign assignee and the secret promise of preference, presented a case which justified the issuing of an attachment. *Nat. Park Bank* v. *Whitmore*, 6 Cent. R. 361.

For instances in which attachments have been dissolved or sustained on the evidence as to fraudulent intent in making an assignment, see *Struthers* v. *Hoffstadt*, 19 Wkly. Dig. 242; *Victor* v. *Henlein*, 1 How. Pr. N. S. 159; *Fleitman* v. *Sickle*, 13 State R. 399; *Greef* v. *Sickle*, 15 State R. 248.

§ 221. *Proceedings by attachments—what property can be levied on.*—In *Nassau Bank* v. *Yandes*, 8 State R. 415, it was held that an assignment executed in Indiana was operative to transfer an indebtedness due to the assignors in this State, and that such indebtedness could not be attached here. The rule is recognized that even if the assignment was fraudulent the title to a chose in action passes to the assignee and an attachment cannot be levied on such assigned chose in action at the instance of a creditor of the assignor.

An attachment regularly issued, although afterward set aside, may be pleaded by the sheriff as a justification to a taking under it. *Day* v. *Bach*, 87 N. Y. 56. But if, after the attachment has been vacated, the attached property is demanded, it is retained, the sheriff will be liable for a wrongful detention. See *Bowe* v. *Wilkens*, 105 N. Y. 322; revg. 1 How. Pr. N. S. 21.

Where several processes are issued at successive times it seems that the plaintiff in the first process may be liable for the whole value of the goods seized, but subsequent plaintiffs and their indemnitors will be liable only for such sum as can be shown to be the value remaining after the preceding seizures have been deducted. *Posthoff* v. *Schreiber*, 54 Supm. Ct. (47 Hun), 593. See *Posthoff* v. *Bauendahl*, 50 Supm Ct. (43 Hun), 570.

§ 222. *Proceedings supplemental to execution.*—The fact that a debtor has made a general assignment is no ground for limiting his examination in supplemental proceedings to a recovery of property acquired after the assignment. It is competent on such proceeding to examine into the good faith and validity of such assignment. *Schneider* v. *Altman*, 8 Civ. P. R. 242; *Wilson* v. *Daggett*, 9 *Id.* 408; *Selligman* v. *Wallach*, 67 How. Pr. 514.

§ 223. *Proceedings by creditors in equity* —See long note on creditor's proceedings in equity. *Brown* v. *Brabb*, 10 West. R. 892. As to the necessity of an execution having

been issued in order to give the judgment-creditor a standing to bring an action in equity to set aside previous judgment as fraudulent, see *Easton Nat. Bank* v. *Buffalo Chemical W'ks*, 55 Supm. Ct. (48 Hun), 557.

In *Royer Wheel Co.* v. *Fielding*, 58 Supm. Ct. (31 Hun), 274, where the action was to set aside several conveyances of real estate, including a general assignment, and the execution was outstanding at the time of the commencement of the action, but was returned unsatisfied before the trial, it was held that such return did not prevent the maintenance of the action. Though the judgment was reversed in the Court of Appeals (101 N. Y. 504), the ruling upon this point in the court below was affirmed.

When a large number of actions are pending, brought by different creditors, to set aside the same assignment, and one has been tried and judgment given for the assignee from which an appeal has been taken, it is proper that the other actions should be stayed to await the determination of the appeal, unless it appears that there is evidence to be submitted additional or different from that presented in the action trial. *Brown* v. *May*, 17 Abb. N. C. 205.

An action to set aside an assignment on the ground of fraud cannot be maintained after the assignee has distributed the trust fund and has been discharged by the court having jurisdiction over the subject. *McLean* v. *Prentice*, 23 W'kly Dig. 73.

§ 225. *Parties.*—In an action brought by a former partner to set aside a transfer of the partnership property, and a subsequent assignment made by the continuing partners, in which action judgment-creditors of the firm were made parties defendants, it was held that after the death of the continuing partner who had made the assignment, the action could not proceed to judgment until it was revived against his representatives, and that the judgment-creditors defendant were not entitled to judgment, setting aside the conveyances when their answers had not been served on the co-defendants. *Edwards* v. *Woodruff*, 90 N. Y. 396. A pre-

ferred creditor whose preferences are attached as invalid, and to whom a portion of the preferred debts has been paid, is a proper party defendant. *Genessee Co. Bk.* v. *Bk. of Batavia*, 50 N. Y. Supm. Ct. (43 Hun), 295.

A preferred creditor may be allowed to intervene though he have no lien upon the fund, and though he is nominally represented by the assignee. *Davies* v. *Fish*, 19 Abb. N. C. 24.

In *White's Bank* v. *Farthing*, 101 N. Y. 344, it is said: "According to the rule established in this State, judgment-creditors holding distinct and several judgments may unite in an action to set aside a conveyance by the common debtor, made in fraud of their right as creditors. This is a convenient rule, but it is not a rule of obligation, but one conferring authority merely. It has never been held that all judgment-creditors so situated were necessary parties to such an action. We think section 452 of the Code does not require the court, on application, to compel a plaintiff to bring in a judgment-creditor not originally a party, as a party to an action withheld by him to set aside a fraudulent conveyance, although the power to direct it to be done cannot be doubted."

In an action to set aside a fraudulent conveyance, the alleged fraudulent grantor is a necessary party defendant. *Hubbell* v. *Merchants Nat. Bk.* 47 Supm. Ct. (42 Hun), 200.

§ 226. *The Complaint.*—A complaint to set aside an assignment, did not allege that the assignment had ever been delivered or that the assignee had accepted the trust, but averred that the assignor had continued in possession, it was held that as against the assignee the suit could be maintained, since the plaintiff had a right to compel the assignee to claim or disclaim title. *Gasper* v. *Bennett*, 12 How. Pr. 307.

In a judgment-creditor's action to set aside an assignment in which preferred creditors had been permitted to intervene and defend, the plaintiff was required at the instance of such creditors to furnish a bill of particulars of

the time and places at which the assignor was alleged to have transferred his estate with a view to abstract it from the assignment. *Claflin* v. *Smith*, 13 Abb. N. C. 205.

But in *Passavant* v. *Cantor*, 55 Supm. Ct. (48 Hun), 546, a similar application made on behalf of the assignee was denied, on the ground that the judgment-creditor ought not to be limited on the trial to specific items in proving fraudulent intent, and for the reason also that the assignee was in position to have or acquire the information sought by the bill of particulars. When an assignment includes both individual and firm property, and the plaintiff is a judgment-creditor, both of the firm and of the individual, he may bring an action based upon both judgments to set aside the assignment. *Greene County Bank* v. *Bank of Batavia*, 5 State R. 414; s. c. 50 Supm. Ct. (43 Hun), 295.

§ 226*a*. *Trial.*—The question of fraudulent intent in a case triable before a jury, must be submitted to the jury if there is ground for opposite inferences, and a conclusion either way would not shock the sense of a reasonable man. This rule was applied and a judgment holding an assignment invalid on the direction of the judge at trial term, was reversed when the evidence, although establishing a case of the wrongful withholding of assets for the assignee, was yet held to be not so conclusive as to justify the court in taking the case from the jury. *Bagly* v. *Bowe*, 6 State R. 842.

A creditor's action to set aside a general assignment which includes real estate, must be brought in the county in which the real estate is situated. An offer on the part of the plaintiff to stipulate that he will not attempt to reach the real estate, or make any claim of title or intent therein, will not defeat a motion to change the venue to the proper county. *Wyatt* v. *Brooks*, 49 Supm. Ct. (42 Hun), 502.

§ 228. *The relief granted.*—It seems that when the action is brought simply to set aside a conveyance of real property, and to enforce a single judgment, the decree may simply

declare the conveyance fraudulent and avoid, and set it aside and declare the plaintiff's judgment a lien on the land, and that it be sold under execution to satisfy the judgment. *Belgard* v. *McLaughlin*, 9 State R. 38.

On setting aside a conveyance as intended to hinder, delay and defraud creditors, claims founded on indebtedness that arose after the fraudulent transfer should not be allowed, nor claims by creditors who have ratified the fraudulent transfers. *Love* v. *Dierkes*, 16 Abb. N. C. 47.

§ 228*a*. *Creditor's bill.—Priority of creditors.—Lis pendens.*—The interest which various judgment-creditors may acquire in the assigned estate by commencing proceedings in the nature of creditors' actions and prosecuting them, are matters of considerable importance. The general rule of law that during the pendency of an action, the subject-matter of which is specific property, an alienation of any part of the property is subject to the final decree, is of very ancient origin. The leading case on the subject in this country is *Murray* v. *Ballou*, 1 John. Ch. 566, in which Chancellor Kent stated the history of the English decisions down to that time. The doctrine rests upon the necessity of such a rule in order to render the decree of the court effectual. The rule is varied somewhat in its application to the different species of property which may be the subject-matter of the litigation. It varies also as it is applied to the rights of innocent purchasers of the property pending the litigation, or to parties to the suit, and those purchasing with notice of the litigation, and also as determining the priorities which different creditors acquire by the institution of their suits.

It is further to be observed that the creditor's right to reach the debtor's property is in no true sense an interest in that property; it is at most only an equitable lien on the property. Pom. on Eq. § 1057, n.

§ 228*b*. *Creditors' suits.—Priority as to real estate.*—The uniform and established rule with regard to real estate,

in Courts of Chancery both in England and in this State, previous to the adoption of the Code was, as stated by Chancellor Kent, in *Murray* v. *Ballou, supra,* as follows: "The established rule is that a *lis pendens,* duly prosecuted and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree, and the *lis pendens* begins from the service of the subpœna after the bill is filed." This rule required a sufficiently accurate description of the property to give notice to an intending purchaser who might examine the bill. The filing of the bill and the service of the subpœna constituted in effect a constructive notice such as is now the result of the filing of a notice of pendency of action under the Code. The Chancery rule was abrogated by the enactment of the Code in 1848 (§ 132), and the pendency of action is now constructive notice only from the time of filing a notice of the pendency of the action. (Code of Civil Procedure, §§ 1670, 1671.) The rule as to third persons who acquire interest in real estate after the commencement of the action is therefore quite definitely fixed; but with regard to the priorities which different creditors may acquire as between each other in the real estate of their debtor which has been fraudulently conveyed, some difficulty has arisen. Where judgments are docketed against a debtor who has made a fraudulent conveyance of his real estate, and actions are subsequently brought by junior judgment-creditors who succeed in setting aside the fraudulent conveyance, the question has arisen whether by their diligence they will be entitled to satisfaction of their judgments in priority to the senior judgments which have been docketed.

Judgments are by statutes made liens upon real estate in the order in which they are docketed. (Code Civil Procedure, § 1251.) And it has been held that the priorities obtained by the docketing of a judgment apply to real estate which has been previously conveyed by the debtor in the event that such conveyance is declared fraudulent. Such was the ruling in the case of *White's Bank* v. *Far-*

thing, 101 N. Y. 344, but this rule may, to some extent, be effected by the form of remedy which the creditor pursues. In the *Chatauqua County Bank* v. *Risley*, 19 N. Y. 369, it was held that where a receiver is appointed in such creditor's action and he makes a sale of the property, he cannot give a title good as against valid liens existing prior to the filing of a complaint.

But when the holder of the lien or claimant of other interest in the premises is made a party to the suit, and the validity of his claim or lien is made a question therein, and is adversely disposed of by the judgment, a sale or conveyance by the receiver will vest in his grantee a title superior to that lien or claim. *Shand* v. *Hanley*, 71 N. Y. 319.

In *Erickson* v. *Quinn*, 15 Abb. Pr. N. S. 166, reported less fully 47 N. Y. 410, Allen, J., states the remedies of creditors against real estate as follows: "The plaintiffs, judgment-creditors of O'Maley, in pursuing their remedy against the land alleged to have been fraudulently conveyed to the defendant, had the choice of three several proceedings. They might have sold the premises by execution on the judgment, and left the purchaser, after his title should have become perfected by a deed from the sheriff, to contest the validity of the defendant's title in an action of ejectment; or, secondly, they might have issued their execution and brought their action to remove the fraudulent obstruction, and awaited the result of the action before selling the property; or, thirdly, they had the right, upon the return of an execution unsatisfied, to bring an action in the nature of a creditor's bill to have the conveyance to the defendant adjudged fraudulent as against their judgment, and the land sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as equitable interests and things in action of a judgment-debtor are reached and applied to the satisfaction of judgments against them." The learned judge proceeds in his opinion to remark that under the cases of *Chatauqua Bank* v. *White*, 6 N. Y. 236, and *Chatauqua Bank* v. *Risley*, 19

N. Y. 369, a creditor pursuing the last remedy is liable to lose the priority of his lien by judgment. Such does not seem to be the construction put upon those cases in *Shand* v. *Hanley*, 71 N. Y. 319, and *Royer Wheel Co.* v. *Feilding*, 101 N. Y. 504.

In the case of the *New York Life Ins. Company* v. *Mayer*, 19 Abb. N. C. 92; affid. 12 State R. 119; affid. Court of Appeals, 13 *Id.* 902, it was held that the lien acquired upon the lands covered by the fraudulent assignment by the docketing of the judgment is not waived by the mere commencement of a suit by the judgment-creditor to set aside the assignment, and asking therein to have a receiver appointed and lands sold, if the plaintiff does not finally take the relief so demanded, but takes a decree declaring the assignment void and his judgment a lien upon the lands as if the assignment had not been made. It was held also in that case, that the lien acquired upon individual property of a partner by a creditor of the firm of which he was a member, by the docket of a judgment, was prior to the equitable right of his individual creditors to the application of his individual property to the payment of their debts. It was also held that these rules applied to surplus moneys arising from the sale of real estate under a foreclosure of mortgage, the legal and equitable liens being transferred to the fund as they existed against the real estate. The case of *Warden* v. *Browning*, 19 Supm. Ct. (12 Hun), 497, appears to be in conflict with the later decisions, though upon its special facts perhaps distinguishable.

In *Scouton* v. *Bender*, 3 How. Pr. 185, where creditors' bills were filed in several actions against a judgment-debtor, to set aside as fraudulent an assignment made by the debtor of all his real and personal estate, and to compel the satisfaction of the judgments out of the equitable interests, etc., of the judgment-debtor, and the assignment was declared fraudulent and void as to creditors, and was decreed to be set aside, with directions to the receiver to convert the real and personal estate assigned to him into

money for the purpose of satisfying the complainants, held, on a motion that the court prescribe a rule for a distribution of the funds received as proceeds of the personal and real estate in the hands of the receiver, there being insufficient to satisfy the whole, *that the creditors were entitled to satisfaction of their judgments respectively out of the funds derived from the real estate in the order of priority of their judgments, and out of the personal funds in the order in which the bills were filed and the equitable liens created.*

In the same case it was also held that a judgment-creditor, who had a *prior* outstanding judgment against the judgment-debtor, and who was not made a party to any of the creditors' bills filed, and was not a party to the motion for distribution, could not be paid out of the fund in court, but that the sale of the real estate under the decree of the court did not subvert the lien of his judgment.

§ 228*c*. *Creditors' suit.—Priority of creditors—personal property.*—It is asserted by Commissioner Dwight in *Holbrook* v. *The New Jersey Zinc Co.*, 57 N. Y. 629, where an exhaustive review of the cases will be found, that "an examination of the English reports will show that a *lis pendens* has only been used in England in cases involving the real estate or interest therein." He was referring, however, to the doctrine as applied to the case of an innocent purchaser pending litigation. In this country, before the introduction of the Code practice and even since, the doctrine has been held applicable to transfers of personal property to innocent purchasers. The question as to the application of the general doctrine of *lis pendens* to transfers of personal property pending the action was first discussed in this State in *Murray* v. *Lylburn*, 2 John. Ch. 441, by Chancellor Kent. In that case he held it applicable to certain mortgage securities, and there are reported cases in this State which would seem to extend the rule to personal property generally. *Scudder* v. *Van Amberg*, 4 Ed. Ch. 29; *Edmeston* v. *Lyne*, 1 Paige, 640; see *Corning* v. *White*, 2 Paige, 567; *Brinkerhoff* v. *Brown*, 4 John. Ch. 671 (see opinion of

Dwight, C., *Holbrook* v. *Zinc Co.*, *supra*). It seems to be conclusively settled, however, that the rule does not apply to transfers, pending litigation, of stocks, bonds or negotiable securities. *Leitch* v. *Wells*, 48 N. Y. 585; *County of Warren* v. *Marcy*, 8 Otto, 96; *Dovey's Appeal*, 97 Penn. 153; *Holbrook* v. *The New Jersey Zinc Co.*, 57 N. Y. 616; *Lindsley* v. *Diefendorf*, 43 How. 357. The common law doctrine of *lis pendens*, as it relates to innocent purchasers, is a harsh one, and the party seeking to apply it, must bring himself precisely within the rule. Not only must the bill have been filed, but it must contain so definite a description of the property as to be notice to the purchaser, if he examine the bill.

Under the Code Practice which does not require the filing of pleadings until final judgment, it may well be doubted whether the common law doctrine of *lis pendens* in its technical application to innocent purchasers of personal property any longer exists. See *Hoolbrook* v. *N. J. Zinc Co.*, 57 N. Y. 616; *Leitch* v. *Wells*, 48 N. Y. 585, 609; *Miller* v. *Sherry*, 2 Wall. 237.

But as between the parties to the suit and persons having actual notice of the pendency of the litigation, and as determining the priorities between various judgment-creditors seeking to reach the property of their debtor, the doctrine of *lis pendens* has undoubtedly a well established and important position. In *Claflin* v. *Gordon*, 46 Supm. Ct. (39 Hun), 54, 59, Mr. Justice Bradley speaks upon this subject as follows: "When there is no interruption by any effectual intervening rights of others, the successful result of an action brought to reach property, has relation to the time of its commencement, and the judgment effects the relief sought as of such time, so that the defendants in the meantime, cannot legally do anything with the subject of the action to impair the beneficial effect of the judgment, nor can a third person affected by notice of the action and its purpose be permitted (except by proceeding *in invitum* by legal process) to acquire any rights to the prejudice of the relief which the judgment purports to give to the plain-

tiffs." This rule is qualified, as to personal property capable of levy and sale under execution. A creditor who seizes such property, even after the commencement of legal proceedings effecting it, is not prejudiced by the pendency of such proceedings, but may proceed to a sale, and the satisfaction of his debt out of such property, and his right in that regard will not be limited until an order is made appointing a receiver. *Storm* v. *Waddell*, 2 Sand. Ch. 494 (star), 516 (star); *Davenport* v. *Kelly*, 42 N. Y. 193; *Albany City Bank* v. *Schermerhorn*, Clarke, 297; *Storm* v. *Badger*, 8 Paige, 130; *Claflin* v. *Gordon*, *supra*.

As to the equitable assets of the judgment-debtor the lien created by the filing the bill has been frequently recognized and applied. *Albany City Bank* v. *Schermerhorn*, Clarke, 298, star paging; *Ins. Co.* v. *Power*, 3 Paige, 365; *Hayden* v. *Bucklin*, 9 Paige, 512; *Roberts* v. *The Albany Railroad Co.*, 25 Barb. 662; *Jeffres* v. *Cochrane*, 47 Barb. 557; affi'd, 48 N. Y. 671; *Beck* v. *Burdett*, 1 Paige, 305.

The commencement of an action by a creditor to reach the choses in action and equitable interests of the debtor, which cannot be reached by execution at law, creates a lien in favor of the plaintiff, good against all persons who have knowledge or are chargeable with knowledge of such lien. *Jeffres* v. *Cochrane*, 47 Barb. 557; affi'd, 48 N. Y. 671.

§ 228*d*. *Creditors' suit—Time at which the plaintiff's right attaches.*—As to the debtor's real estate we have already referred to the decisions respecting the priorities of creditors who proceed by creditors' bills. As to the debtor's personal property a distinction is to be observed as to rights acquired as against innocent purchasers and rights acquired as against purchasers with notice and as to priorities among creditors. As to the former at common law, the rule was well established that the *lis pendens* began from the service of the subpœna after the bill was filled. "This," says Bennett in his work on *lis pendens*, section 28, "has been the rule for over three hundred years, established by a long series of well considered cases, and while as a new

question many strong reasons may be assigned for a different rule, it is too well established to be shaken." He cites the following New York cases: *Murray* v. *Bullou*, 1 John. Ch. 566; *Murray* v. *Lylburn*, 2 *Id.* 441; *Green* v. *Slayter*, 4 *Id.* 38; *Hopkins* v. *McLaren*, 4 Cow. 667; *Murray* v. *Blatchford*, 1 Wend. 583; *Jackson* v. *Andrews*, 7 *Id.* 152; *Parks* v. *Jackson*, 11 Wend. 442; *Griffith* v. *Griffith*, 1 Hoff. Ch. 153; *White* v. *Carpenter*, 2 Paige, 217, 252; *Hayden* v. *Bucklin*, 9 *Id.* 512; *Jackson* v. *Losee*, 4 Sand. Ch. 381.

As to third parties a *lis pendens* is not created under the present system until the summons has been served and a complaint filed, in which the claim of the plaintiff upon the specific property is set forth. Courts will not indulge in any presumption that the complaint was filed for the purpose of effecting an innocent purchaser with notice of pendency. *Leitch* v. *Wells*, 48 N. Y. 585. Indeed, it may well be doubted whether the Code Practice, with its provisional remedies, contemplated the continued existence of the chancery doctrine of *lis pendens* as to innocent purchasers, except in the manner provided as to real estate.

As to purchasers with notice, and as determining the priorities between creditors, the priority is obtained at the time when the court first acquires jurisdiction at the suit of the creditor. Under the old chancery practice the creditor who, after first filing his bill, obtains the first service of the subpœna, or made a *bona fide* attempt to serve the same, had his suit first commenced and was entitled to a priority in payment out of the property of the judgment-debtor. *Boynton* v. *Rawson*, 1 Clarke, 584; *Corning* v. *White*, 2 Paige, 568; *Fitch* v. *Smith*, 10 Paige, 9; *Burrell* v. *Leslie*, 6 Paige, 445.

In *Albert* v. *Back*, 52 Supr. Ct. (20 J. & S.) 550; affid. 101 N. Y. 656, it appeared that after a summons had been served on the assignee in an action to set aside the assignment, which was not accompanied with a complaint, nor did it designate the purpose of the action, the assignee paid a sum of money to a preferred creditor, in proceedings for an accounting on a judgment in the action setting aside the assignment, held that inasmuch as the assignee had actual

notice of the object of the action before making the payment, he could not be allowed the sum so paid.

Whether the title of a receiver appointed on the final decree, to tangible personal property, dates back to the beginning of the action or only to the date of the order of appointment, depends upon whether legal rights have intervened. In *Clarke* v. *Brockway*, 1 Abb. Dec. 351, it seems to be assumed that as to some classes of property the receiver's title commences from the filing of the order directing the appointment of the receiver, and that it relates back to the date of that order only.

Becker v. *Torrance*, 31 N. Y. 631; *Van Alstyne* v. *Cook*, 25 *Id.* 489; *Davenport* v. *Kelly*, 42 N. Y. 193, hold that the lien, if any, created by the filing of a creditor's bill in favor of the plaintiff upon leviable personal property, is subject to priorities to be obtained by other creditors, by judgment or attachment, at any time prior to the appointment of a receiver. Whether the junior of two creditors who had commenced actions could obtain a priority as to personal property over the senior, by procuring the appointment of a temporary receiver, has not been determined, but it seems that he could under the decisions cited. In *Claflin* v. *Gordon*, 46 Supm. Ct. (39 Hun), 54, 57, J. Bradley stated the rule as follows: "By the commencement of an action in equity by a judgment-creditor as such, he obtains a lien upon the things in action and equitable interest of the debtor, which is defeasible until, and becomes effectual upon, his recovery of judgment (citing cases). But the rule is otherwise in respect to property which is the subject of levy by execution, in so far that the action is no interruption to such legal remedy. And no lien is acquired in or by the action to defeat the right to make such levy until a receiver is appointed."

A creditor by the commencement of a judgment-creditor's suit in equity obtains at once a lien on all choses in action and personal property not subject to legal levy, and upon all equitable interests in real estate, which the judgment-debtor may have. The phrase "commencement of a

judgment-creditor's suit" is here used technically, and includes all steps necessary to create a *lis pendens*, a pending suit in equity. Thus, under the old chancery practice it included, first, filing of the bill; second, issuing of subpœna, and, third, service of the subpœna, or a *bona fide* attempt to serve the same. *Boynton* v. *Rawson*, 1 Clarke, 584; *Corning* v. *White*, 2 Paige; *Fitch* v. *Smith*, 10 Paige, 9.

§ 229. *Protection of assignee.*—In *Meyer* v. *Hazard*, 17 State R. 26, it was held that where an assignment was set aside as fraudulent and void, and a decree was made directing the assignee to account and deliver the assigned property to a receiver, on such accounting the assignee should not be allowed as a part of his expenses, chargeable out of the assigned estate, counsel fees incurred in defending against the suit brought by the judgment-creditor which resulted in defeating the assignment.

And in *Dexter* v. *Adler*, Daily Register, June 20th, 1888, Judge Lawrence, at Special Term, in passing upon a similar account, disallowed commissions to the assignee as well as all counsel fees incurred after the filing of the creditor's bill.

The doctrine laid down by the court in *Meyer* v. *Hazard*, appears to be open to criticism. Daniels, J., writing the opinion, says that the expenditures allowed to a trustee "have been limited to those which have been incurred and made on behalf of the assigned and trust estate and also for its benefit. Where they result otherwise, and prove to be disastrous instead of beneficial, there the rule which is sanctioned by the authorities by implication decidedly excludes their allowance."

The general rule applicable to the allowance of expenses incurred by trustees has been frequently stated.

It is expressed by Judge Duer, in *Noyes* v. *Blakeman*, 3 Sandf. 531, 543, in this language, "The law is most clearly settled, and it would be a reproach to its principles or its administration were it otherwise, that all the necessary expenses of a trustee, *that is, all expenses of every kind*

which are reasonably and in good faith incurred by him for the defense, protection or reparation of the estate, are to be treated in equity as a charge in all cases," either on the income or principal of the trust estate. The principle upon which this doctrine rests, as applied to counsel fees, is thus stated by Finch, J., in *Matter of Attorney-General* v. *North American Life Insurance Co.* 91 N. Y. 57, 61: "The principle upon which counsel fees are granted in such instances is that of a necessary disbursement, and it stands upon the same ground as any other necessary expense of the preservation of the fund. Often and usually the trustee has no interest outside of the performance of duty. What he does is for the benefit of others whose interests are for the time being in his keeping. He owes them no duty to expend his own money for their benefit and whatever he does so expend in the reasonable and prudent care of the trust fund is properly allowed to him as an expense. Counsel fees thus incurred to an extent approved by the court may therefore be allowed to him, and if fixed in advance of his actual payment they are none the less the necessary expenses of his trust."

So in *Downing* v. *Marshall,* 37 N. Y. 380, 389, it is said, as the rule at common law, "In short the trustee though allowed nothing for his trouble is allowed everything for necessary expenses in executing the trust. His duties relate to the property and interests of others and he is to be indemnified for necessity expenses in protecting such trust property, and has an equitable lien upon it for such expenses."

The opinions thus expressed are in harmony with all the adjudged cases and with the conclusions of text writers. *Sullivan* v. *Miller,* 106 N. Y. 635, 643; see *Lewin on Trusts,* 634, star paging; *Pomeroy's Equity,* section 1085; *Perry on Trusts,* section 910.

The general rule being thus unquestioned, the inquiry is whether it includes expenses of litigations unsuccessfully undertaken or defended by the assignee without practical benefit to the estate, assuming them to have been incurred

in good faith and with the prudence which an intelligent and careful man would show in his own affairs. A rule which would preclude a trustee from such allowances would certainly be a severe one. It would require of him an infallibility of judgment which we do not expect in the highest judicial tribunals where opinions are sometimes conflicting. It is suggested in *Meyer* v. *Hess*, *supra*, that an assignee may protect himself against loss by calling upon the creditors to indemnify him before he proceeds with litigation. It is doubtful whether that is a practical protection to the assignee. Undoubtedly, after the expenditures have been incurred he would have a remedy over against the *cestui que trust* (Code, § 1916), but whether he could compel the *cestui que trust* in advance to indemnify him is not clear. (*Lewin on Trusts*, 643, star paging; *Fraser* v. *Murdock*, 6 Appeal Cases, 855, 872.) It would seem that if minors or other persons under disability were among the *cestui que trust*, the trustee could not escape liability for abandoning his trust by calling upon them for indemnity. And there are cases where the assignee has been held personally responsible to creditors for not bringing actions the result of which we could not with certainty foresee. (See *post*, § 327.)

As between the *cestui que trust* and the trustee, there seems to be no reported case where the trustee has been held personally liable for expenses incurred in defending or prosecuting actions on behalf of the trust, because he was unsuccessful, if he was guilty of no negligence or wrong. The contrary was held in *Courtney* v. *Rumley*, 6 Irish Reports, Equity, 99; *Holford* v. *Phipps*, 4 Beav. 475; *Poole* v. *Pass*, 1 Beav. 600.

With regard to cases where the trust is set aside by creditors, the decisions are conflicting as to whether the trustee should be allowed for his expenses of defending against their attack.

Wakeman v. *Grover*, 4 Paige, 23, cited in *Meyer* v. *Hess*, was taken to the Court of Errors, and the opinions in that court are reported in 11 Wend. 187. On the question of allowances, a divided court held that the trustee and all the

parties to the suit were entitled to their costs to be paid out of the fund.

In *Goldsmith* v. *Russell*, 5 DeG. M. & G. 556, upon a decree setting aside a trust at the suit of a creditor, the trustee was allowed all his costs and expenses.

And in *Travis* v. *Illingworth*, Weekly Notes, 868, p. 206, which is an extreme case, the court held that where trustees had been invalidly appointed, but had acted *bona fide* in the trust, believing themselves to be duly appointed, they were entitled to their cost, charges and expenses as if their appointment had been valid.

In *Woods* v. *Axton*, Weekly Notes, 866, p. 207, where an assignment for creditors was set aside at the suit of an assignee in bankruptcy, it was held that the voluntary assignee should be allowed his expenses. But in *Platt* v. *Archer*, 13 Blatch. 351; *Smith* v. *Dresser*, L. R. 1 Eq. 651, and *Elsey* v. *Cox*, 26 Beav. 95, which were all cases in bankruptcy, the courts refused to allow the trustee his expenses of defending the suit in which the assignment was set aside.

In neither *Ames* v. *Blunt*, 5 Paige, 13, nor *Colborn* v. *Morton*, 1 Abb. Dec. 378, was the precise point we are now considering discussed or passed upon.

In *Meyers* v. *Becker*, 36 Supm. Court (29 Hun), 567; affi'd, 95 N. Y. 486, such expenses were allowed without dispute, and see *Bostwick* v. *Beizor*, 10 Abb. Pr. 197; *MacDonald* v. *Moore*, 1 Abb. N. C. 53; *Havermeyer* v. *Loeb*, 5 *Id.* 338.

This being the state of authorities, it is permissible to examine the question upon principle. The distinction between a trust which is absolutely void and one which is voidable merely must be borne in mind. In the latter case the conveyance is good as against the grantor until it is judicially declared invalid. In the case now under discussion, the person seeking to set aside the trust is not one having the legal or the equitable title to the property conveyed, but is simply a creditor seeking to collect his debt. A creditor's right in any specific property

of his debtor arises at law only by levy of process; in equity by the operation of equitable remedies. In neither tribunal can the creditor take more than the debtor has at the moment of seizure, except so far as a Court of Equity makes its decree retroactive under the doctrine of *lis pendens*. If, therefore, the court can reach property or money disposed of by the assignee in the payment of counsel fees before the appointment of a receiver, it must be by virtue of the retroactive effect of the decree by reason of the commencement of the creditor's suit, but as we have seen in another place (see § 228a), the commencement of a suit in equity by a creditor creates only an equitable lien in his favor, and that is a lien which takes effect as to different species of property on the happening of different events. If, therefore, the assignee can be charged with moneys which he has paid out before the appointment of a receiver, it must be because the judgment-creditor has acquired a lien upon such money by the commencement of his suit.

But the assignee acquires by virtue of his appointment as against the assignor an equitable charge upon the property in his hands for the re-payment of all his expenses. In making disbursements to sustain the trust, imposed upon him, he is at once a trustee for creditors and he is the agent of the assignor. The judgment-creditor succeeds only to the rights of the assignor as they are at the moment his attack becomes operative. He can get no more than the assignor himself is entitled to at that moment. But the time when the attack of the creditors shall be regarded as operative, depends, in the absence of the appointment of a receiver, wholly upon the nature and extent of the lien created by the commencement of the action. The whole inquiry therefore resolves itself down to the question whether the creditor's lien created by the commencement of his action is superior to that of the assignee who has disposed of the property under the direction of the trust before the appointment of a receiver. This, at most, is not a question of legal right, but of the enforcement of equitable charges. The lien created by the commencement

of a creditor's action is an equitable lien, and should be so enforced as not to work an injustice. An assignee who has accepted an apparently valid trust authorized by law, and who is ignorant of any fraud in its creation, and who assumes towards innocent third parties the obligation to maintain the trust, has a manifest right to appeal to a court of justice for protection against loss in the performance of his duty, up to the point at least where it can be shown that he knew or had reason to know that the trust was invalid. It does not seem to be a harsh rule to require that the creditor who has possession of evidence unknown to the assignee, upon which he expects to be able to set aside the assignment, should at least proceed to the appointment of a receiver on such evidence before it should be adjudged that the assignee should be held personally responsible for the protection of the trust which he has innocently assumed.

It is to be observed, however, that the only cases in which the assignee has not been allowed such expenses are those in which the attack was made by an assignee in bankruptcy. The title of an assignee in bankruptcy to property fraudulently disposed of by the bankrupt, is in some respects different from the right of a judgment-creditor toward such property. An adjudication in bankruptcy clothes the assignee at once with the title to all the bankrupt's property, and when he removes a fraudulent incumbrance he simply frees the estate which is already his from such incumbrance. Such, however, as we have seen, is not the precise position of a judgment-creditor.

§ 229*a*. *Protection of assignee—Commissions.*—With regard to the allowance of commissions to assignees where the assignment has been set aside at the suit of a judgment-creditor, it was recently held by Judge Lawrence, in *Dexter* v. *Adler*, Daily Register of June 20th, 1888, that the assignee would not be allowed commissions under such circumstances, and that also is the statement of the text, but a

careful review of this question leaves it open to doubt whether such is the correct rule.

In *Leavitt* v. *Yates*, 4 Ed. Ch. 134, and *Coope* v. *Bowles*, 42 Barb. 87, cited in the text, it was held that the assignee was not entitled to compensation where a general assignment was set aside, but in each of those cases the assignment was *void*, not voidable. (See 4 Ed. Ch. 205, star paging.)

In *Bostwick* v. *Beizor*, 10 Abb. Pr. 197, the assignee was allowed all payments made to others than himself.

In *MacDonald* v. *Moore*, 1 Abb. N. C. 53; *Havermeyer* v. *Loeb*, 5 Abb. N. C. 338; *Platt* v. *Archer*, 13 Blatch. 351, where assignments were set aside in the United States courts in bankruptcy, the State assignees were allowed their commissions.

In re Stubbs, 4 N. B. R. 376; *Clark* v. *Marx*, 6 Ben. 275; *Burkholder* v. *Stump*, 4 N. B. R. 597, a contrary rule was applied.

In *Hunker* v. *Bing*, 9 Fed. R. 277, where the assignment was declared void, the assignee, although not allowed commissions as such, was allowed an aggregate sum as compensation for services which he had rendered and which were regarded as beneficial to the estate.

The legal question presented here is somewhat different from that upon which the claim for allowance for counsel fees rests. As a matter of fair dealing, it would seem that where an assignment good between the parties is set aside by a judgment-creditor for fraud in which the assignee did not participate, the assignee should be allowed his commissions or at least the fair value of his services for the following reasons: (1) Such a rule is equitable. The services of the assignee in the care of the assigned property, and in converting it into money, are beneficial to the judgment-creditor, and are such services as if not rendered by the assignee would have to be performed by a receiver at the expense of the firm. The receiver appointed by the decree in the creditor's suit should not be paid for these services which he has not rendered, and the judg-

ment-creditor ought not to profit by them at the expense of the assignee who acts in good faith. He who asks equity should do equity. (2) The Act of 1877, section 26, provides that the assignee named in the assignment shall receive for his services a certain commission. This appears to give the assignee a lien on the fund for his compensation. It is not unreasonable to claim that the lien so created should take priority to the lien acquired by the judgment-creditor.

CHAPTER XVI.

AMENDMENT, REFORMATION AND REVOCATION OF ASSIGNMENTS.

§ 232. *Second assignment.* — When the assignment is void, and is therefore inoperative, as where a limited copartnership executes an assignment with preference which by statute is declared void (1 R. S. 766, §§ 20, 21), no title passes, and a subsequent valid assignment may be made by the assignors. *Schwartz* v. *Soutter*, 103 N. Y. 683, affig. 48 Supm. Ct. (41 Hun), 323, where it was also held that the assignment was void because the statute was not complied with respecting the written assent of the assignee to the assignment, and that the subsequent assignment was valid.

In *Sutherland* v. *Bradner*, 46 Supm. Ct. (39 Hun), 134, where the assignment directed the assignee, after payment of certain preferences, to return the assigned property to the assignors, and the assignors subsequently executed another assignment which directed the distribution of the surplus among the general creditors, it was held that the first assignment was good between the parties, that the assignor had nothing therefore that he could convey under the second assignment, nor was it competent for the court to correct the first assignment on the ground of mutual mistake, so as to prejudice the subsequently acquired rights of creditors. *Warner* v. *Jaffray*, 96 N. Y. 248, 255.

§ 234. *Reformation of assignment.*—In *Van Winkle* v. *Armstrong*, 4 Cent. R. 53, suit was brought to rectify an assignment made in New York, so as to insert words of inheritance under which real estate in New Jersey would pass.

Where the assignment contains a mere clerical error, but the true meaning and intent cannot be doubted, the court must give effect to the instrument according to its true intent. In such a case it is not necessary that there should be a reformation of the instrument decreed. *Smith* v. *Bellows*, 3 State R. 305.

CHAPTER XVII.

FOREIGN AND DOMESTIC ASSIGNMENTS.

§ 236. *Bankrupt assignments.*—In the *Matter of Accounting of Waite*, 99 N. Y. 433, overruling *Mosselman* v. *Caen*, 34 Barb. 66; N. Y. Supm. Ct. (4 T. & C.) 171; and reviewing *Abraham* v. *Plestoro*, and *Willets* v. *Waite*, *Johnson* v. *Hunt*, and *Raymond* v. *Johnson*, cited at § 237, the court deduces the following rules: "(1.) The statutes of foreign States can in no case have any force or effect on this State *ex proprio vigore;* and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2.) But the comity of nations, which Judge Denio, in *Petersen* v. *Chemical Bank* (32 N. Y. 21), said is part of the common law, allows a certain effect here to titles devised under and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be without prejudice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies herein under our statutes; provided, also, that such titles are not in conflict with the laws or the public policy of our State. (3.) Such foreign assignees can appear, and, subject to the conditions above

mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt.

In *Phelps* v. *Borland*, 103 N. Y. 406, it was held that a foreign discharge in bankruptcy is not a defense to an action brought here upon a debt or obligation of the bankrupt by a citizen who was not a party to and did not appear in the bankruptcy proceedings, although such debt or obligation was contracted under the law of the jurisdiction of the bankruptcy court, and was to be there paid.

A note to this case, with a collection of authorities, will be found in 5 Cent. R. 424.

§ 237. *Right of foreign bankrupt assignee to sue.*—In *Matter of Waite*, 99 N. Y. 433, the question of the right of a foreign bankruptcy assignee to appear in our courts was fully discussed on the authorities, and the conclusion was reached that neither *Abram* v. *Plestoro*, 3 Wend. 538, nor *Johnson* v. *Hunt*, 23 Wend. 91, had directly passed upon the question. The cases of *Moselman* v. *Caen*, 34 Barb. 66; 4 T. & C. 171, were overruled, and the conclusion was reached which is stated in the third proposition cited in the preceding paragraph.

§ 238. *Voluntary assignments.*—See a long note on the effect to be given to foreign voluntary assignments. *Askew* v. *La Cygne Ex. Bk.*, 24 Am. L. Reg. 403.

§ 242. *Assignments which contravene the law of the situs.*—In *May* v. *First Nat. Bank*, 11 West. R. (Ill.) 638, it was held that an assignment with preferences, executed in New York between citizens of that State, would be deemed a valid transfer of real estate in Illinois as against an attachment sued out by a resident of Massachusetts. Citing the remarks of the court in *Bentley* v. *Whittemore*, 19 N. J. Eq. 462: "The true rule of law and public policy is this, that a voluntary assignment made abroad, inconsistent in sub-

stantial respects with our statute, should not be put in execution here to the detriment of our citizens, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect."

Bentley v. *Whitmore* has been followed by *Receiver, &c.* v. *First Nat. Bk. of Plainfield*, 34 N. J. Eq. 450; *Van Winkle* v. *Armstrong*, 41 *Id.* 402; *Kimball* v. *Lee*, 8 Cent. R. 637.

In *Eastern Nat. Bank* v. *Hulshizer*, 2 State R. 93, where an assignment with preferences was made in this State, and the assignors owned personal property in New Jersey which was not mentioned in the inventory, it was held that the assignment with preferences not being permissible under the laws of New Jersey, there was no inference of fraudulent intent to be derived from the failure to include in the inventory the personal property situated there. But in *Blain* v. *Pool*, 13 State R. 571, where an assignment with preferences was made in this State by debtors, one of whom owned real estate in New Jersey which was not taken possession of by the assignee, and was afterwards conveyed by the debtor in discharge of firm debts, it was held that under the recent New Jersey decisions — *Bentley* v. *Whitmore*, and cases cited above — the assignment made here, although with preference, was valid to pass title in New Jersey, except as to citizens of that State, and that the doctrine of that State, as expressed in *Varnum* v. *Camp*, 1 Green, 326, and *Moore* v. *Bonnell*, 2 Vroom, 90, had been modified by the later decisions.

In *Warner* v. *Jaffray*, 96 N. Y. 248, an assignment was made by debtors in this State who owned personal property situated in Pennsylvania. The statute of that State provides that assignments shall be recorded, and provided that a *bona fide* purchaser, mortgagee or creditor shall not be prejudiced by the assignment until recorded. Creditors obtained attachments on the personal property in Pennsylvania, and this action was brought by the assignee against such creditors to restrain the prosecution of their suits. It was held that the creditors might obtain attachments under the Pennsylvania law, and that of this State courts

were required to give full faith and credit to such proceedings.

In *Nassau Bank* v. *Yandes*, 50 Supm. Ct. (44 Hun), 55, affig. *Nassau Bank* v. *Ritzinger*, 5 State R. 309, it was held that an assignment made in Indiana between residents of that State was effectual to pass title to commercial paper and stock held by a bank in this State as collateral for a discounted note, and that the proceeds of such collateral in excess of the debt passed to the assignee to whom the bank was under an obligation to pay it, notwithstanding attachments had been obtained and served upon it, and that the bank, under the circumstances, could not compel the assignee to interplead with the sheriff as to the title to such fund. See *Coates* v. *First Nat. Bk. of Emperia*, 47 Super. Ct. 322, 335.

And in *Moore* v. *Battin*, 14 State R. 191, it is held that an assignment made in Canada, in conformity with the provisions of the statutes of that country, will be recognized in this State as passing a good title to the assignee of all the property there situated or which may be subsequently brought into this State.

In *Keller* v. *Paine*, 107 N. Y. 83, where *Guillander* v. *Howell*, 35 N. Y. 657, seems to be regarded as reversed by the reversal of *Warren* v. *Van Buskirk*, the rule is stated that the liability of personal property situated in this State, but belonging to a non-resident, to be attached and sold under legal process, is to be determined by the law of this State and not by that of the jurisdiction where the owner lives.

In *O'Neil* v. *Nagle*, 15 State R. 358, an assignment with preferences was made here by a resident of this State, which included a debt due from a resident of New Jersey. Subsequent New Jersey creditors attached the indebtedness in that State, but the assignee, finding the debtor in this State, also sued him here for the debt to which he pleaded the attachment in New Jersey, which was held to be a good defense. No reference is made in this decision to the case of *Blain* v. *Pool*, 13 State R. 571, or to

the later New Jersey case of *Bentley* v. *Whitmore*. Under these decisions, the assignment being good in New Jersey except as to New Jersey creditors, it is a question whether our courts are bound to enforce the New Jersey laws for the benefit of residents of New Jersey to the prejudice of their own citizens. See opinion of McAdam, J., in this case below, 19 Abb. N. C. 399, and note at p. 403.

In *Halsted* v. *Straus*, 32 Fed. R. 279, an assignment having been made in New York by a resident of that State, with preferences, a firm doing business in New York, one member of which was a resident of New Jersey, obtained an attachment in New Jersey against a debt due to the assignors. In an action brought by the assignors for the benefit of the assignee to collect this debt, held that the attachment was no defense, the assignment being good as against any but New Jersey creditors, and that the fact that one of the New York firm was a resident of New Jersey did not bring the firm within the exception. See *Schuler* v. *Israel*, 27 Fed. R. 851, and note, at p. 853; *Chafe* v. *Fourth Nat. Bk. of New York*, 71 Me. 514.

The rule that a voluntary general assignment for the benefit of creditors, made in another State and valid by its laws, will be recognized as valid, and as effectually transferring personal property wherever the same may be situated, is supported by the following cases; *In re Page Sexsmith Lumber Co.* (Minn.), 16 N. W. Rep. 700; *Butler* v. *Wendell* (Mich.), 23 N. W. Rep. 460. But see *Richardson* v. *Rogers* (Mich.), 8 N. W. Rep. 526.

A general assignment for the benefit of creditors, made in another State, is valid in Maine, so far as to protect the assigned real estate situated in Maine from attachment by a non-resident creditor who has assented to the assignment and received a part of the benefits thereby secured to him. *Chafee* v. *Fourth Nat. Bk. of New York*, 71 Me. 514.

In *Faulkner* v. *Hyman* (Mass.), 6 N. E. Rep. 849, it is said that an assignment for the benefit of creditors, executed by a citizen of New York to another citizen of that State, and which includes certain property situated in

Massachusetts, will not be enforced by the courts of that commonwealth to affect the rights of parties resident there who have not assented to the assignment, and who have made an attachment of the property here subsequent to the assignment in New York.

§ 245. *Where the parties are all citizens of the State in which the assignment is made.*—In *Cunningham* v. *Butler*, 2 New Eng. R. 338 (a Massachusetts case), it appeared that a resident of that State, having become embarrassed financially, suspended payment, and offered a compromise to his creditors. Pending the discussion of the proposition of compromise, a Massachusetts creditor assigned a claim against the debtor to a resident of New York, who thereupon commenced attachment proceedings in that State, and attached a debt due to the debtor. Subsequently the debtor was adjudged insolvent under the Massachusetts Insolvent Law, and an action was brought by the assignee to restrain the Massachusetts creditor from prosecuting the attachment proceedings in New York, and an injunction was granted accordingly.

But when an assignment with preferences was made in New York, and the assignee, under an order of the court, made on notice to all the creditors, assented to the compromise of a claim due to the debtor, and the other contracting party, who was a receiver appointed in New Jersey, had become obligated to pay the composition, it was held that a New Jersey creditor could not, in the New Jersey courts, attach the claim due to the assignor and treat the assignment as void. *Kimball* v. *Lee*, 4 Cent. R. 332.

CHAPTER XVIII.

JURISDICTION OF COUNTY COURTS AND COMMON PLEAS UNDER THE GENERAL ASSIGNMENT ACTS OF 1877.

§ 247. *Jurisdiction of County Courts.*—In the *Matter of Morgan*, 99 N. Y. 145, it was held that where an assignee for the benefit of creditors has by mistake paid over to a creditor a portion of the proceeds of the property assigned, to which a preferred creditor was in fact entitled, the county court has power, under the General Assignment Act, upon petition of the creditor entitled to the fund and upon notice to the creditor receiving it to order the latter to return the amount to the assignee to be by him paid out as directed by the assignment. And see further, as to the power of the county court on petition, § 282, *post.*

§ 250. *Concurrent jurisdiction of Supreme Court.*—By chapter 380, Laws of 1885, it is provided that "all powers, rights and duties conferred upon county courts and county judges by chapter four hundred and sixty-six of the Laws of eighteen hundred and seventy-seven, entitled 'An act in relation to assignments of the estates of debtors for the benefit of creditors,' and by acts amendatory thereof, and additional or supplemental thereto, are hereby also conferred upon and shall be exercised by the supreme court and the justices of the supreme court of the State of New York concurrently with county courts and county judges. All applications under said acts made in the supreme court shall be made to the court, or a justice thereof, within the judicial district where the assignment is recorded, and all proceedings and hearings under said acts had in the supreme court upon the return of a citation, shall be had at a special term of said court held in the county where the judgment-debtor resided at the time of the assignment, or in case of an assignment by copartners, in the county where the principal place of business of such copartners was at the time of such assignment."

CHAPTER XIX.

THE INVENTORY, SCHEDULES AND BOND.

§ 255. *Failure to file inventory and schedules.*—Since the passage of the Act of 1878 (Laws of 1878, chap. 318), the assignment does not become inoperative by reason of a failure to file the inventory. *Warner* v. *Jaffray*, 96 N.Y. 248; see *Pratt* v. *Stevens*, 94 *Id.* 387.

A failure by the assignee to file the inventory and schedule within thirty days, or such additional time as may be allowed, is ground for his removal. (See § 253.)

§ 257. *The inventory and schedules are part of the assignment.*—In *Denton* v. *Merrill*, 5 State R. 387, 393, where the schedule was prepared by the assignee, it was said that this schedule may have been competent as evidence, but it was not necessarily a part of the assignment in such sense as to make the amount mentioned as the debt to a particular creditor the amount intended to be paid to that creditor under a preference in the assignment.

"It is difficult," says Barker, J., "to see how the act of an assignee subsequent to the assignment, in causing to be made a schedule, 'in so far as he can,' can ordinarily be treated as characterizing the intent of the assignor in making it; at all events it cannot, as matter of law, be said that the assignee in such case, has expressed in the schedule the purpose of the assignor when he executed the assignment and thus give invalidity to the latter."

"The making of the schedules when made by the assignor may so far be treated as under his contemplation when the assignment was executed as to reflect upon and characterize his purposes in making the assignment, and it is usually entitled to such effect." *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; *Shultz* v. *Hoagland*, 85 N. Y. 464, 468, 469; *Phillips* v. *Tucker*, 14 State R. 120.

In *Talcott* v. *Hess*, 4 State R. 62, the doctrine that the

schedule and inventory, where made by the assignor, are to be regarded as part of the assignment, was applied, and the case was distinguished from *Kavanagh* v. *Beckwith*, 44 Barb. 192, where the error in the inventory appeared to be the result of mistake.

§ 258. *Form of inventory and schedules.*—The Act requires that the inventory shall contain a full and true account of all creditors, the sum owing to each, with the true cause and consideration therefor. A general statement of what the debts were contracted for is a sufficient statement of the cause and consideration to satisfy the statute. *Eastern Nat. Bank* v. *Hulshizer*, 2 State R. 93.

§ 261*a*. *Extension of time to file inventory and bond.*—In cases where the assignor does not prepare and file the inventory and schedule, and that duty devolves upon the assignee, it may be that he cannot prepare them within thirty days after the date of the assignment, and since the schedule of property is essential to fix the amount on which a bond should be required, it has been the custom of the Court of Common Pleas in a proper case to make an order extending the time within which the bond might be filed.

§ 265. *Failure to file the bond.*—The failure to file the bond as required by the Act of 1877, could have no effect on the validity of an assignment made before that act went into effect. *Smith* v. *Newell*, 39 Supm. Ct. (32 Hun), 501.

In *Ryan* v. *Webb*, 46 Supm. Ct. (39 Hun), 435, it appeared that the assignee having failed to file the bond required issued an execution upon a judgment which he himself recovered and under which he bought at sheriff's sale the assigned property. A proceeding was then had for his removal as assignee, and a new assignee was appointed, who demanded all the property from the old assignee, who, thereupon claimed to hold it as purchaser under the sheriff's sale. It was held, however, that by the execution

and acceptance of the assignment, the title to the assigned property vested in the assignee as such, and that his sureties on an appeal bond were liable in an action brought on his failure to surrender the property.

§ 267. *Form and amount of bond.*—The statement in *Matter of Robinson*, 10 Daly, 148, that an approval of an assignee's bond by a judge of the Supreme Court is a nullity, has been superseded by the Act of 1885, chap. 380, conferring concurrent powers under the Assignment Act on the Supreme Court and its justices. See *Supra*, § 250.

§ 268. *Provisional bond.*—It is now understood to be an invariable rule of each of the justices of the Court of Common Pleas, to refuse to permit the filing of a provisional bond until after the expiration of the twenty days within which the assignor may file the inventory and schedule. If the assignor fails to file the inventory and schedule, the assignee may file such inventory and schedule, which may be amended if necessary.

CHAPTER XX.

POWERS AND DUTIES OF ASSIGNEES IN GENERAL.

§ 276*a*. *Stoppage in transitu after assignment.*—Where imported goods have arrived subject to the payment of duties, it is sometimes important for the assignee to know whether the vendor under the particular circumstances can exercise the right of *stoppage in transitu*. This will, of course, depend upon the inquiry whether the goods have come into the actual or constructive possession of the assignee.

There are three situations in which the goods may be placed :

1st. They may be on shipboard, or on the wharf, the entry at the Custom House having been made but the goods not having been removed. In this case, the right of stoppage exists. *Holbrook* v. *Vose*, 6 Bosw. 76; *Harris* v. *Pratt*, 17 N. Y. 250; *Mottram* v. *Heyer*, 5 Den. 629.

2d. The goods may have been stored by reason of the failure of the owner to claim them, and may thus be "subject to general order." In this case also, the right *of stoppage in transitu* exists.

In *Mottram* v. *Heyer*, 5 Den. 629, 631, the court says: "Under our revenue laws, if the consignee or owner of goods neglects to enter them and pay or secure the duties within a time prescribed by law for that purpose, so as to get a permit to land the goods, the revenue officers are required to take and retain the possession thereof, and the removal of the goods from the vessel to the public store by the Custom House officers until the consignees shall entitle themselves to claim the possession and disposition of the goods by completing their entry by the payment of the duties was merely substituting the public store in the place of the vessel as a place of deposit in the transmission of the goods to their place of destination." This is in conformity with *Northey* v. *Field*, 2 Esp. Rep. 613, and other English cases. See *Strahlheim* v. *Wallack*, 12 Daly, 313.

3d. The goods may have been entered and regularly bonded and warehoused. In this case, the stoppage ceases. This is well reasoned and illustrated in the case of *Fraschieris* v. *Henriques*, 6 Abb. N. S. 251 (Gen. Term Supm. Court), in an opinion of Barrett, J., in which he shows that the plan of our revenue system permitting the entry and bonding of goods, gives the importer such rights and powers as are incompatible with the idea of a continued transit, and he cites with approval the language of Chancellor Walworth, in *Mottram* v. *Heyer*, as follows: "Where goods are placed in the public store under the warehousing system, either in this country or in England, after a perfect entry of them for that purpose, they are to be considered as having come to the possession of the vendee at the place

where he intends they shall remain until he gives further orders for their disposal, and in such a case I have no doubt the right of stoppage in *transitu* should be considered at an end the moment the goods are thus deposited, after a perfect entry for that purpose has been made." A decision of similar effects is *Wiley* v. *Hall*, 2 Canada Superior Court Rep. 1.

§ 278. *Contracts of assignor.*—While the assignee is under no obligation to carry out contracts entered into by the assignor, if he assumes such contracts and undertakes to perform them he will make himself liable for a future default. Thus, in *Patton* v. *Royal Baking Powder Co.*, 52 Supm. Ct. (45 Hun), 248, the assignor had contracted to furnish boxes in certain quantities to the defendant for a term of years, and having made an assignment to the plaintiff the plaintiff notified the defendant that he would execute the contract, but afterwards informed him that he would be unable to continue to carry it on. In an action brought by the assignee to recover for the goods delivered, it was held that the defendant might set off any damage he had sustained by failure of the assignee to perform the contract.

In the *Matter of Adams*, 12 Daly, 454, where it appeared that the assignor, a manufacturer, had contracted to deliver all his product to the claimant or commission merchant, it was held that after an assigument the assignee could not be compelled to deliver the manufactured goods on hand at the time of the assignment to the claimants. See remarks of Daly, C. J., p. 461.

§ 282. *Application to the court for instructions.*—In the *Matter of Mumford*, 5 State R. 303, where the court was asked by petition to compel the assignee to deliver up certain trust funds which had come into his hands, the court held that it had jurisdiction on such a proceeding to dispose of the question. The assignee did not in that case contest the question of jurisdiction.

In re Assignment of Watson, 3 How. Pr. N. S. 313, the court (Com. Pleas Special Term), on motion, entertained an application by a consignor of goods to compel the assignee of the consignee to pay over the proceeds of goods and ordered a reference to ascertain the facts.

In the *Matter of Witmer*, 47 Supm. Ct. (40 Hun, 64), it was claimed that the court had power on motion to compel the assignee to deliver property which the assignor had wrongfully received. This claim was based on the 25th section of the assignment act, which provides that any proceeding under the act is to be deemed a proceeding had in the court, as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown, and after the recording and filing of an assignment under the act, the court may exercise the powers of a court of equity in reference to the trust, and any matters involved therein. It was held, however, that this section gave the court no power to compel the assignee to do an act which was not in the line of the performance of the trust, but in hostility to it.

In the *Matter of Morgan*, 99 N. Y. 145, affig. 34 Hun, 217, it was held that in a proceeding for an accounting by the assignee, the court had power to make an order directing a party to whom the assignee had mistakenly made a payment which should have been made to another creditor to return the same, and directing its proper application. It will be observed, however, that this order was made in a proceeding to enforce the trust.

In the *Matter of Potter* v. *Durfee*, 51 Supm. Ct. (44 Hun), 197, the opinion expressed in the *Matter of Witmer*, *supra*, was approved, and it was held that under the assignment act there was no power conferred upon the court to determine on petition conflicting claims to property which had come into the possession of the assignee. The provision of section 22 of the act providing for entering orders and

decrees of the court, "releasing assets by the assignee," was said to contemplate cases where the assignee should himself be satisfied that a release should be made, and where he is willing to make it, in such a case the court may authorize and approve the action of the assignee, and thus furnish by the record protection to him.

In the *Matter of Connor*, 24 Wkly. Dig. 217; affid. 105 N. Y. 619, without opinion, it was held that on a proceeding for a final accounting where the assignor had wrongfully hypothecated certain bonds to a broker, who had also certain other security upon which he realized more than was due to him, and paid over the balance to the assignees upon whose accounting it was ordered that owners of the bonds should first be paid since the proceeds of their bonds went to make the balance received by the assignee, the court cited, to sustain its jurisdiction, *Matter of Morgan*, 99 N. Y. 145. It is not clear, however, how the claimant could be relieved as claiming under the trust, where the basis of his right is the fact that he is not a creditor. See *Matter of Cavin*, 105 N. Y. 256.

CHAPTER XXI.

TAKING POSSESSION AND CUSTODY OF THE ASSIGNED PROPERTY.

§ 293. ***Property fraudulently obtained by assignor.***— When a part of the purchase price has been paid before the fraud has been discovered, the vendor may retake the goods upon tender of whatever he has received of value on the sale, but where the goods, after payment by the vendee of part of the purchase-money, were passed to an assignee under a general assignment, it was held that the vendor might replevy such of them as remained, upon an offer at the trial to

restore the amount received, less the value of the goods unreplevied and the depreciation in value of those replevied. *Schoonmaker* v. *Kelly*, 49 Supm. Ct. (42 Hun), 299; 3 State R. 771. This case is open to criticism so far as it appears to hold that the sale can be rescinded without an offer at the time of the rescission, to restore the purchaser to his position. See dissenting opinion of Learned, J., and cases cited by him.

A demand and refusal being requisite before an action of replevin can be sustained against an assignee unconnected with the fraud, a demand upon a servant having custody of the assigned property for the assignee and his refusal to deliver, unless the servant acted under the direction of master, will not suffice. "An agent or servant having the custody merely of goods cannot bind the principal by acceding to the demand of a third person, nor on the other hand by refusing to deliver the property." *Goodwin* v. *Wertheimer*, 99 N. Y. 150. Whether a demand on the servant would be sufficient where the master had concealed himself or was out of the jurisdiction, was considered but not decided in this case.

When the goods sought to be replevied are in the custody of the custom officials and therefore not subject to process of replevin, an equitable action in the nature of a replevin may be maintained against the fraudulent assignors and the assignee, requiring the assignee to make entry of the goods in the custom house and to take such steps as may be needful to enable the purchasers to obtain possession of their property, and in such an action an injunction may be issued restraining the defendants from disposing of the goods. *Strahlheim* v. *Wallach*, 12 Daly, 313.

§ 294. ***Property fraudulently disposed of by the assignor.*** —The question whether the assignee stands in the position of creditors or simply in the place of the assignors as to the charge of an unfiled chattel mortgage, has not as yet been decisively determined by the Court of Appeals. *Ball* v. *Slaften*, 33 Supm. Ct. (26 Hun), 353, was affirmed on the

ground that on the undisputed facts the mortgage was, as matter of law, fraudulent and void as to creditors, and that the assignee could, upon that ground, assail it. 98 N. Y. 622.

In *Reynolds* v. *Ellis*, 41 Supm. Ct. (34 Hun), 47; affi'd, 103 N. Y. 115, it appeared that the lessor of a store had stipulated in the lease that the landlord should have a lien upon his stock in trade as security for the rent, which lien, however, was not to apply to goods which had been sold in the regular course of business. The lessor subsequently executed a general assignment, and in an action by the landlord to enforce his lien it was held that the assignee might resist the enforcement of the provision of the lease as being fraudulent as to creditors. This case was put on the ground of actual fraud on the face of the agreement, following the decisions in *Edgell* v. *Hart*, 9 N. Y. 213, and *Gardner* v. *McEwen*, 19 *Id.* 123. In *Sullivan* v. *Miller*, 106 N. Y. 635; affig. 40 Hun, 516, after a chattel mortgage has been executed and while it remained unfiled, the mortgagor executed a general assignment, and on the same day the chattel mortgage was filed; subsequently the assignee having been removed and a receiver appointed, he took possession of the mortgaged property and under the order of the court sold it and applied the proceeds to payment of the mortgages, and on application by a judgment-creditor to vacate this order it was held that even if the assignee could not defeat the lien of the mortgage, a subsequent judgment-creditor could not acquire any lien upon the mortgage property until after levy and no levy having been made the judgment-creditor was not in position to dispute the correctness of the order.

In *Crisfield* v. *Bogardus*, 18 Abb. N. C. 334, Brown, J., at Special Term, decided that a mortgage executed by an assignor free from fraud, could not be treated as void by the assignee, because it had not been filed before the making of the assignment. He cites a number of decisions in other State, bearing upon the question. In *Niagara County Nat. Bank* v. *Lord*, 40 Supm. Ct. (33 Hun), 557, upon an accounting the plaintiff, a judgment-creditor, sought

to bring into general distribution the proceeds of certain goods, secured by a pledge under an instrument in the nature of a warehouse receipt. The court held that the pledge being good between the parties the assignee had no power to assail it on the mere fact of omission to file the instrument. And an unfiled chattel mortgage was held good as against a receiver in supplementary proceedings, in *Stewart* v. *Cole*, 50 Supm. (43 Hun), 164, and in *Dorthy* v. *Servis*, 53 Supm. Ct. (46 Hun), 628, which was an action brought by the assignee and a judgment-creditor, it was held that as to the assignee the unfiled chattel mortgage took precedence of the conveyance to him and as to the judgment-creditor, his judgment not having been obtained until after the assignment, there remained no property-right in the debtor which he could reach.

Crouse v. *Frothingham*, 34 Supm. Ct. (27 Hun), 123, cited in the text, is reversed, 97 N. Y. 114, where it is held that where a creditor sues, basing his right to sue upon the fact that the assignee has improperly refused to sue, the decree must follow the assignment and the fruits of the recovery be distributed according to its terms.

§ 297. *Examination of debtor and other witnesses.*—In the *Matter of Holbrook*, 99 N. Y. 539, an order was affirmed which denied a motion for an order directing a referee to whom an examination had been referred to report his opinion, and authorizing him to subpœna witnesses to appear before him with their books and papers, and directing the assignors to produce before the referee all their books and papers. The court were of opinion that under the twenty-first section of the Act the judges had no power to direct the referee to report his opinion on the evidence, or to examine such witnesses, or compel the production of such books and papers as the petitioner may require, but that the judge must himself, in the order, name the witnesses and the books and papers, and that sufficient facts must appear upon behalf of the applicant to justify the conclusion that the proposed examination is sought in good faith

and in aid of the assignment. The examination under this section is intended to be in aid of the assignment. The examination cannot be instituted for the purpose of obtaining evidence to defeat the assignment.

An examination for the purpose of discovery of property fraudulently concealed by the debtor, or debts fraudulently inserted by him in his schedule, may furnish the basis of two distinct remedies to creditors. Creditors may move the assignee in such examination to the recovery of such concealed or fraudulently appropriated property and the resistence of such fraudulent debts, or they may proceed to attack the assignment.

When courts undertake to say that an examination to obtain knowledge of the facts is permissible, but an examination to obtain the knowledge of the facts for a particular purpose is not permissible, the difficulty of applying the rule practically defeats the remedy. See *Matter of Rindskopf*, 16 Abb. N. C. 316, n.

The rule as laid down in *Matter of Wilkinson*, 43 Supm. Ct. (36 Hun), 134, is as follows: "When the petition shows that there is reasonable ground for apprehending that the assignor has fraudulently disposed of his assets, or that the assignor or assignee have fraudulently omitted assets from the inventory, or placed upon the schedules claims which are fraudulent in whole or in part, an examination may and should be ordered." See also *Matter of Landaur*, 22 Wkly. Dig. 73.

As to examination of judgment-debtor in supplemental proceedings as to assigned property, see *Seligman* v. *Wallach*, 16 Abb. N. C. 319; *Schneider* v. *Altman*, *Id.*, 312.

CHAPTER XXII.

COLLECTING IN THE ESTATE.—SUIT BY ASSIGNEE.

§ 301. *The right to sue.*—The title to the assignor's *choses in action* passes to the assignee by the execution and delivery of the assignment. *McMahon* v. *Sherman*, 14 State R. 637. The assignee cannot divest himself or be divested of his right to sue for assets so long as the trust continues. *Stanford* v. *Lockwood*, 95 N. Y. 582.

§ 303. *Parties.*—A creditor may be permitted to intervene in an action brought against an assignee where, owing to peculiar circumstances, it is necessary or proper that he should be permitted to do so in order to protect his interests under the assignment. *Davies* v. *Fish*, 19 Abb. N. C. 26; *Chandler* v. *Powers*, 1 Civ. Pro. 355.

§ 306. *Set-off.*—In *Rothschild* v. *Mack*, 49 Supm. Ct. (42 Hun), 72, the plaintiff was indebted to the assignors upon an unmatured claim, and before the assignment indorsed certain notes for accommodation of the assignors, which they were compelled to pay, it was held that the plaintiff could in equity enforce a set-off of the amount so paid against the indebtedness from them, although neither obligation had matured at the date of the assignment. The case of *Chance* v. *Isaacs*, 5 Paige, 592, 594, is criticised, and the correctness of the ruling in that case is doubted. In *Littlefield* v. *Albany County Bank*, 97 N. Y. 581, the general rule is laid down that equity requires that when two claims are connected, although one is unliquidated, a set-off should be compelled when, by reason of the insolvency of either debtor, satisfaction cannot be obtained by the other, and the cases are examined.

CHAPTER XXIII.

SALES OF THE ASSIGNED PROPERTY.

§ 320. *Disability of assignee to purchase.*—The assignee should not be allowed to bid at a sale of property of the assigned estate merely because he makes claim against the estate of an indebtedness to himself which is disputed by the assignor, and the validity and amount of which have not been determined. *Matter of Black*, 13 Daly, 21.

§ 321. *Sale of uncollectible claims.*—By chap. 464, of Laws of 1884, section twenty-three of the Assignment Law is amended so as to read as follows:

§ 23. The county judge where the assignment is recorded may upon the application of the assignee, and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise, or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing, upon the final accounting of such assignee, that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the county judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him.

CHAPTER XXIV.

LIABILITY OF ASSIGNEE.

§ 328. *Liability for negligence.*—In the *Matter of Geery*, 13 Daly, 373, it was sought to hold the assignee liable for a failure to prosecute an action on an alleged liability to the assignors for fraudulent representations, the court disallowed the claim on the facts. In the following cases the liability of executors for a failure to prosecute claims due to the estate was considered: *Hollister* v. *Burritt*, 21 Supm. Ct. (14 Hun), 291; *Harrington* v. *Keteltas*, 92 N. Y. 40; *Parker* v. *Conner*, 93 N. Y. 118.

In the *Matter of Carpenter*, 52 Supm. Ct. (45 Hun), 552, it was held that an assignee might be made liable, on his final accounting, for a failure to recover property transferred by the assignor before the assignment in fraud of creditors. The point was made by the assignee that since the fraudulent grantees were not parties to the accounting, and were not therefore bound by the judgment upon it, but when sued might be able to rebut and answer all the charges of fraud, that the assignee should not be made to respond to creditors for a fraud which possibly had never been committed, and that therefore, before the creditor should be permitted to charge the assignee on the accounting, he should have at least requested the assignee to bring suit to set aside the fraudulent conveyance, and should himself have brought such suit. This contention, however, was overruled. The case is open to criticism. It seems fair that a creditor who has information of the fraudulent character of a conveyance by his debtor should be required to communicate such information to the assignee, and request him to act upon it. This affords the assignee an opportunity to compel the creditor to indemnify him against the result of a disastrous suit if the claim is doubtful. If the creditor declined to assume that responsibility, he might still bring the action in his own name.

Fraudulent or collusive conduct on the part of the assignee would present a different question.

§ 331. *Rent.*—In *Weil* v. *McDonald*, 21 Wkly. Dig. 440 (Supm. Ct. First Dept.), when the assignee declined to accept the lease, and so notified the landlord, but offered to rent the domiciled premises at $50 a month, which the landlord refused to accept, demanding a larger sum, and threatening to depose the assignee if it were not paid, held that the assignee was not liable for rent under the lease for a continued possession of the premises, but was liable as a tenant by sufferance, and was chargeable for rent at the sum demanded by the landlord.

§ 335. *Liability of co-assignee.*—In *Bruen* v. *Gillet*, 51 Supm. Ct. (44 Hun), 293, where one trustee joined with the other in drawing out the moneys of the trust, which were then left with one trustee who was a private banker, it was held that the co-trustee was liable for the loss of the funds. The court remarked (Follet, J.): "The rule measuring the liability of a trustee for the *devastavit* of a co-trustee in a continuing trust is not quite applicable to this case. In continuing trusts it may not, under some circumstances, be actionable negligence for a trustee to intrust his co-trustee with the securities of the estate, even though by such action loss accrues. The trust in question was an active one, and these assignees knew that it was their duty to speedily convert the estate into money, care for it with vigilance, and promptly distribute it among the creditors, and neither trustee can escape liability by intrusting the sole management of the estate to his co-trustee."

When one assignee placed the trust funds under the sole control of his co-assignee, who was engaged in business as a banker, and so had it within his power to use it in his business, and he did so use it, and afterwards became insolvent, it was held that the assignee was liable for the loss of the fund. *Bruen* v. *Gillet*, 7 State R. 632.

CHAPTER XXV.

DEATH, REMOVAL, RESIGNATION OR DISABILITY OF ASSIGNEE.

§ 340. *Removal of assignee for misconduct.*—In the *Matter of Kaughran*, 13 Daly, 526, it appeared that the assignor, just before making the assignment, permitted judgments to be taken upon offer with the design of securing a priority to certain creditors. With one of these creditors the assignee was on peculiar business relations, such as would embarrass him in undertaking to defeat the priority of the judgments. It was held that this presented a proper case for the removal of the assignee under the statute.

§ 343. *Practice on removal under the Act.*—On an accounting on the removal of an assignee, he will be charged with the inventoried value of the assigned property, and the burden is on him to show that the value there given is not the actual value. *Matter of Wolff*, 13 Daly, 481.

Where one of the assignees has removed from the State, so that no personal notice can be served on him, the court may order the mode of giving notice. In the *Matter of Cohen*, 2 How. Pr. N. S. 523, the court directed that notice be given by mail at the last known place of residence of the assignor. In the *Matter of Henlein*, Daily Reg. July 20, 1884, the assignee was removed on the ground that he was administering the estate in the interest of the assignors.

CHAPTER XXVI.

CLAIMS AGAINST THE ASSIGNED ESTATE—NOTICE TO CREDITORS—PROOF OF DEBT.

§ 348*a*. *Creditors who have proceeded in hostility to the assignment.*—When a creditor obtained an attachment which he sought to levy on the assigned property, but took nothing, it was held that this was not such an election as precluded him from afterward maintaining an action to compel an accounting under the assignment. *Sternfeld* v. *Simonson*, 51 Supm. Ct. (44 Hun), 429.

In *Iselin* v. *Henlein*, 16 Abb. N. C. 73, the creditors who had issued an attachment present a proof of debt with a statement accompanying it, that they did not thereby waive any right, they had acquired under the attachment, nor did they recognize in any manner the validity of the said assignment unless the same is held to be valid and binding. Van Vort, J., expressed the opinion that the assignee, cognizant of the proceedings taken by the plaintiffs in hostility to the assignment, could doubtless reject the proof and the claim. *See Moller* v. *Tuska*, 87 N. Y. 166.

§ 350. *Notice to creditors to present claims.*—Notice of an accounting by an assignee under a general assignment must be given to a creditor preferred in the assignment, although such creditor has not presented his claim to the assignee, and the time limited by advertisement for the presentation of claims has expired. *Matter of Young*, 13 Daly, 413.

§ 350*a*. *Special rule of Supreme Court, first department.*—A rule has been adopted by the judges in the first department as follows:

"In all actions or proceedings in which the accounts of an assignee are settled or passed upon, a notice, or a copy of an advertisement requiring creditors to present their claims to the referee, must be mailed to each creditor whose

name appears on the books of the assignor, with the postages thereon prepaid, at least twenty days before the day specified in such advertisement, or notice for presenting claims, and proof of such mailing must be required on the application for a final decree, unless proof is furnished that personal service thereof has been made upon such creditors."

§ 354. *Wages.*—The fact that the person claiming priority for debt as an employee, was not actually employed at the date of the assignment, but claims for services previously rendered, furnishes no substantial objection to the priority. *Matter of Heath*, 53 Supm. Ct. (46 Hun), 114. Nor does the fact that the employee has received a note due at a future time for his wages, convert the debt into one for a loan, or defeat the priority. *Ibid.*

§ 356. *Secured creditors.*—In *Allen* v. *Danielson*, 4 N. Eng. R. 106, the Supreme Court of Rhode Island, reversing the opinion expressed in *Petition of Knowles*, 13 R. I. 90, held that creditors secured by a mortgage on the debtor's property, were entitled to dividends on the basis of the indebtedness at the time of the assignment, and not merely on the deficiency after applying the security. To the same effect are *Miller App.*, 35 Pa. 481; *Graeff's App.*, 79 Pa. 146. But in *Third Nat. Bank* v. *Lanahan*, 6 Cent. R. 425, the Maryland Court of Appeals decided that securities belonging to the debtor should be first applied, and dividends paid only on the deficiency, and see *First Nat. Bank* v. *Eastern R. R. Co.*, 124 Mass. 524; *Bates* v. *Paddock*, 9 N. East. R. 257.

The fact that a claim has been proved in composition proceedings in bankruptcy is not a waiver of right which a creditor has under a general assignment previously made by the bankrupt. *Matter of the Objections of Woodward*, 67 How. Pr. 359.

§ 358. *Unliquidated and unaccrued claims.*—The *Matter of Adams*, referred to in the text, is reported, 15 Abb. N. C. 61; s. c. 67 How. Pr. 384.

Rent accruing after the assignment on a lease made by the assignor is not a claim payable out of the assigned estate under the assignment. *Matter of Link*, 6 State R. 211; *Matter of May*, 47 How. Pr. 37; *Matter of Risley*, 10 Daly, 44.

CHAPTER XXVII.

ACCOUNTING.

§ 362. *Jurisdiction of the subject-matter.* — While the Supreme Court will not compel the assignee to account after proper proceedings have been instituted in the County Court, yet it will entertain an action for discovery which will be in aid of an accounting. Thus in *Niagara County Nat. Bank* v. *Lord*, 40 Supm. Ct. (33 Hun), 557, after a proceeding for an accounting had been commenced in the County Court. A judgment-creditor brought an action in the Supreme Court asking to have it adjudged that certain mortgages or pledges upon the assigned property were not liens thereon.

The jurisdiction of the Supreme Court to entertain an action to compel the assignee to account was affirmed in *Hurst* v. *Bowen*, 17 Weekly Dig. 167.

§ 364. *Parties.*—Where an action is brought by one creditor on behalf of himself and others, to compel an assignee to account and distribute, an order requiring creditors who desire to come in and prove their claims, as a condition to contribute their proportion of the plaintiff's costs and expenses, is unauthorized. *Matter of Lewis* v. *Hake*, 49 Supm. Ct. (42 Hun), 542.

It is not necessary, or proper, that creditors who wish to prove their claims should be joined as plaintiffs in an action brought for an accounting. The judgment in such action provides for bringing in all creditors. *Ibid.*

§ 366. *Defenses.*—The fact that actions are pending in another court against an assignor and assignee to set aside the assignment, is not a bar to a proceeding for an accounting, nor does it present a reasonable excuse for delaying the account. *Matter of Dare*, 13 Daly, 220.

§ 369. *Notice to creditors to present claims.*—By a special rule of the first department a notice must be mailed to each creditor whose name appears on the books of the assignor, at least twenty days before the day specified for presenting claims. See *ante*, § 350*a*.

In a suit for an accounting a creditor who has not received notice to prove his claim before the referee, or who, having received notice did not understand the effect of it, will, after the day fixed by the referee and before the final distribution of the fund, be allowed, on showing an excuse, to come in and prove his claim and contest the assignee's account. *Downey* v. *May*, 8 State R. 481.

§ 371. *Form of account.*—In support of the statement that the inventoried value of the assigned property is the basis of the assignee's account, see *Matter of Wolff*, 13 Daly, 481.

§ 375. *Allowances to assignee.*—In the Court of Common Pleas, it is held that the assignee will not be allowed for payments made to counsel for preparing the assignment (unless such charge is specifically provided for in the deed itself), nor for services in preparing the inventory and schedules or the assignee's bond, nor for a retainer, nor for services of an attorney on the removal of an assignee. *Matter of Carrick*, 13 Daly, 181; *Matter of Wolff*, 13 Daly, 481. But see *Sullivan* v. *Miller*, 106 N. Y. 635, 643.

Where the assignee carries on the former business of the assignor and it does not appear that such continuance was a benefit to the estate, he will not be allowed the expenses thereby incurred. In such a case he should be

charged with the value of the assets as they came into his hands, and should be allowed the ordinary expenses of administering his trust. *Matter of Marklin*, 13 Daly, 105.

§ 376. *Assignee's commissions.*—An agreement by the assignor to pay the assignee a larger sum than five per cent. for his commissions, will not be enforced on the assignee's accounting. Such a provision contained in the assignment would probably render it fraudulent, as to creditors. *Boegler* v. *Eppley*, 2 State R. 101.

Where the preferred creditor was paid partly in cash and partly in property, which he accepted in lieu of cash, it was held that the assignee was entitled to his commissions on the entire amount of money and property turned over. *Matter of Bassford*, 13 Daly, 22.

So where the preferred creditor purchased a portion of the assigned property for a sum sufficient to pay the preference, but made no payment, giving in lieu a receipt for the preference to the assignee, it was held that the assignee was entitled to his commissions on the entire amount. *Matter of Watson.*

§ 370. *Final hearing and decree.*—A judge sitting at Special Term, held at Chambers, in the city of New York, has the power to confirm the report of a referee appointed to take and state the accounts of an assignee. *Boegler* v. *Eppley*, 2 State R. 101.

§ 384. *Where an account will not be ordered.*—The fact that actions are pending to set aside the assignment, is no bar to a proceeding to account, and not an excuse for delay. *Matter of Dare*, 13 Daly, 220.

§ 387. *Citation* —The fact that the citation was signed by the county judge and was not made by the court, is a mere irregularity, which is waived by an appearance. *Langford* v. *Cook*, 23 Weekly Dig. 309.

§ 388. *Who must be served.*—Where the surety was also a creditor, and was served with the citation addressed to him in person, it was held that he was bound as surety upon the decree rendered. *Langford* v. *Cook*, 23 Weekly Dig. 309.

§ 393. *Proceedings before the referee.*—Upon a reference on an accounting where there is no opposition to the allowance of the account presented by the assignee, it is not the duty of the referee to enquire into the items of the account; and if of his own motion he examines the assignee as to disbursements charged against the estate, the court will not, even where suspicious clews are discovered, withhold its allowance of the account, nor will it allow fees to the referee for his unnecessary labor. *Matter of May*, 13 Daly, 24.

§ 383. *Who may petition.*—In the *Matter of Stowell*, 53 Supm. Ct. (46 Hun), 342, on proceedings for an accounting, it appeared that after the assignment had been made proceedings for a composition in bankruptcy were instituted, in which the creditors consented to discharge the debtor on receipt of a percentage of their claims, and also consented that the assigned property should be re-transferred to the assignor; the petitioning creditor's name appeared on the list of creditors in the composition proceedings, but he did not participate in the proceedings; it was held that he could compel the assignee to account.

§ 401. *Enforcement of decree.*—The decisions in *Matter of Radtke*, 10 Daly, 119; *Matter of Stockbridge*, *Id.* 33, are no longer authority. In *Matter of Brick*, 13 Daly, 312, it was held that under section 2268, Code of Civil Procedure, where the assignee has neglected to distribute as directed, he will render himself liable to punishment for contempt of court. This case, however, does not seem to be in accord with the rulings in the Supreme Court. See *Code Civ. Pro.* § 124; *People ex rel. Borst* v. *Grant*, 48 Supm. Ct. (41 Hun),

351; *People ex rel. Fries* v. *Riley*, 31 Supm. Ct. (25 Hun), 587; *Jacquin* v. *Jacquin*, 43 Supm. Ct. (36 Hun), 378; *Pritchard* v. *Pritchard*, 4 Abb. N. C. 298; *O'Gara* v. *Kearney*, 77 N. Y. 423; *Myers* v. *Becker*, 95 N. Y. 486.

CHAPTER XXVIII.

TERMINATION OF THE TRUST—DISCHARGE OF THE ASSIGNEE.

§ 404. *Termination of the trust.*—The case of *McCahill* v. *Hamilton*, 27 Supm. Ct. (20 Hun), 388, was criticised in *Kip* v. *Hirsh*, 103 N. Y. 565, where it was held that the Act of 1875 applied to assignments made before as well as to those made after the passage of the Act, and to the same effect is *N. Y. Steam Co.* v. *Stern*, 53 Supm. Ct. (46 Hun), 207.

§ 408. *Discharge of assignee and sureties on final accounting.*—Where real estate was included in the assignment, and an assignee was substituted in the place of the original assignee, and in proceedings for foreclosure the original assignee only was made a party, it was held that he was the owner of the fee so that the equity of redemption was cut off, although before the foreclosure was begun proceedings for an accounting by the substituted assignee had been instituted, in which a decree was entered discharging the original assignee from all liability for anything contained in his account which included the real estate, the decree also provided that upon payment being made as therein provided, the assignee be discharged from all liability in reference to said assignment; it did not appear, however, that the assignee had made the payments so directed. *Julian* v. *Lalor*, 54 Supm. Ct. (47 Hun), 164.